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IN THE

Supreme Court of the United States

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JAMES H. McKE

OCTOBER TERM, A. D. 1911.

No. 47.

STANDARD OIL COMPANY OF INDIANA, Plaintiff in Error,

v.

THE STATE OF MISSOURI ON THE INFORMATION OF ELLIOTT W. MAJOR, Attorney-General, Defendant in Error.

No. 48.

REPUBLIC OIL COMPANY, Plaintiff in Error,

v.

THE STATE OF MISSOURI ON THE INFORMATION OF ELLIOTT W. MAJOR, Attorney-General, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

DEFENDANT'S STATEMENT, BRIEF AND ARGUMENT.

ELLIOTT W. MAJOR,
Attorney-General.
CHARLES G. REVELLE,
Assistant Attorney-General,
Attorneys and Counselors for Defendant in Error.

THE HUGH STEPHENS PTG. CO., JEFFERSON CITY

PART I.

STATEMENT OF THE CASE AND SALIENT FACTS, ABSTRACT OF PLEADINGS AND SPECIFICATIONS OF ERROR.

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STATEMENT OF THE CASE.

This is a *writ of error* to review the judgment of the Supreme Court of the State of Missouri entered on the 23rd day of December, 1908, adjudging that plaintiffs in error, by

reason of their violation of the statute of Missouri, entitled *"Pools, trusts and conspiracies; unlawful combinations,"* approved March 24, 1877, and an act of the General Assembly of the State of Missouri, approved April 2, 1891, entitled *"An act providing for the punishment of pools, trusts and conspiracies to control prices, and as to evidence and prosecution in such cases,"* have forfeited their license to do business in the State of Missouri, and that the same be cancelled and annulled, and that each of said plaintiff in error pay to the State of Missouri, in addition to said forfeiture, the sum of $50,000 for the violation aforesaid, of said laws. (*State ex inf. v. Standard Oil Co.*, 218 Mo. 1-507) (Record, pp. 337-340.)

The proceeding upon which this judgment was rendered was one in quo warranto instituted originally in the Supreme Court of the State of Missouri by the Attorney-General against the plaintiffs in error, the Standard Oil Company of Indiana, and the Republic Oil Company, and, also, the Waters-Pierce Oil Company against which judgment was rendered, but which company paid its fine and has not appealed.

Upon the joinder of issue, Honorable Robert A. Anthony, in accordance with the practice of the State Supreme Court in original proceedings, was appointed special commissioner to take evidence, with power and directions to report thereon his findings of fact and law to the court. (Record pp. 32-33.)

In conformity to such directions the commissioner heard the evidence and submitted his report sustaining the truth of the allegations in the information. (Record, 124-309.)

Upon exceptions to this report, filed by plaintiffs in error and the Waters-Pierce Oil Company, the Supreme Court of Missouri reviewed the whole case, adjudged the plaintiffs in error and the Waters-Pierce Oil Company guilty, and rendered judgment as above stated.

A.

ISSUES MADE BY THE PLEADINGS.

INFORMATION.

Under the provisions of the common law and the statutes of the State of Missouri against combinations and trusts, the Attorney-General, in the information upon which this action is predicated, charged in substance that the plaintiffs in error and the Waters-Pierce Oil Company, which latter company has not appealed, had, between the ——— day of ——— 1901, and the 29th day of March, 1905, created, entered into and become members of a pool, trust, agreement, confederation, combination, arrangement and understanding among themselves for the following purposes:

First: To regulate, fix and control the price to be paid by retail dealers and others in the State of Missouri for the refined products of petroleum sold and offered for sale in this State.

Second: To control and limit the trade in the refined products of petroleum in this State.

Third: To control, limit and prevent competition in the business of buying and selling the refined products of petroleum in this State between themselves and others engaged in like business.

Fourth: To deceive and mislead the public into the belief that said respondents were separate and distinct corporations, each pursuing an independent business as legitimate competitors in the purchase and sale of the products of petroleum.

There then follows an allegation that said respondents by said pool, trust, agreement, confederation, combination, arrangement and understanding had accomplished each and all of said unlawful and illegal purposes for which the pool,

trust, agreement, understanding and combination had been perfected.

It is further alleged that in the furtherance and enforcement of said pool, trust, combination, etc., formed by said respondents for the purposes set forth, and as a part thereof, said respondents had for the accomplishment of such unlawful purposes (1), divided the State of Missouri as a trade territory between the Standard Oil Company and the Waters-Pierce Oil Company, each refusing to sell oil in the territory of the other; (2) that the Republic Oil Company, sold oil in the territory of each of the other respondents to those who would not, by reason of prejudice against either of the other respondents, or for other reasons, buy of them; and crushed out competition in the sale of the products of petroleum by temporarily reducing the price thereof to the customers of such competitors, but that no actual competition existed between the Republic Oil Company and either of the other respondents in their respective trade territories.

(3) That the Standard Oil Company is engaged in the business of refining petroleum, and has at Whiting, Indiana and near Kansas City, Missouri, large refineries, but that by reason of said pool, trust, combination and agreement between said respondents, and in compliance with and enforcement thereof, said Standard Oil Company has agreed to sell and does sell the products of petroleum in the State of Missouri only to the Waters-Pierce Oil Company and Republic Oil Company and through itself, and that the Republic Oil Company and the Waters-Pierce Oil Company, by reason of said trust, combination and agreement, agreed to buy and do buy the products of petroleum only of the Standard Oil Company.

(4) That by reason of said trust, combination and agreements and the acts done in furtherance and in pursuance thereof, as above set forth, the respondents have been able to control and monopolize from 85 to 90 per cent of the oil

business in the State of Missouri; that they have thereby been able to control and do control the prices at which the products of petroleum are sold in Missouri; that they have prevented competition among themselves in said business; that they have controlled the purchase and the sale of the products of petroleum in the State of Missouri, have limited the trade therein, driven out competition and deprived the public of the benefits of competition in the purchase and sale of the products of petroleum and deceived and misled the public into the belief that the respondents are each independent of and competitors of each other.

There then follows another specific allegation as to the existence of a trust, combination and agreement between the respondents for the various unlawful purposes and for the doing of the various unlawful acts herein set forth. (Record, pp. 6, 7, 8, 9, 10.)

ANSWERS.

(1) Each of the allegations of the information are specifically *in ipsimisis verbis* denied by the Republic Oil Company, (pp. ———), and the Standard Oil Company, plaintiffs in error; they were also denied in the form of a general denial by the Waters-Pierce Oil Company, thus putting in issue the truth of each of the allegations of fact in the information.

After the conclusion of the testimony in the case, plaintiffs in error filed a second amended answer, in which it was pleaded, as additional defenses, that:

(2) Each of sections 8965, 8966, 8967, 8968, 8971, 8972 and 8978 of the Revised Statutes of Missouri of 1899, upon which it is alleged the information is based, is unconstitutional and void, for each of the following reasons:

(a) It violates the Fourteenth Amendment to the Constitution of the United States.

(b) It violates the provisions of section 8, article 1 of the Constitution of the United States, which gives to Congress the power to regulate commerce with foreign nations and among the several States and Indian tribes, in which commerce respondent is engaged.

(c) It violates section 10 of article I of the Constitution of the United States, which provides that no State shall pass any ex post facto law, or law impairing the obligations of contracts.

(d) It violates section 4, article 2 of the Constitution of the State of Missouri, providing that all persons shall have a natural right to life, liberty and the enjoyment of the gains of their industry.

(e) It violates the provisions of section 30, article 2 of the Constitution of the State of Missouri, providing that no person shall be deprived of life, liberty or property without due process of law.

(f) It violates section 53 of article 4 of the Constitution of the State of Missouri, which forbids the Legislature from granting to any corporation, association or individual any special or exclusive right, privilege or immunity.

(g) It prohibits all barter and commerce by prohibiting any two or more persons from agreeing upon either the present or future price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining or any article or thing whatsoever as between themselves, whether the same tends to the prejudice of the public interest or not, whether in restraint of trade, whether reasonable or unreasonable under the circumstances and limitations of such fixing of prices of said commodities, without regard to the relation of the parties to such agreement or their purposes, and in each of such respects violates each of the foregoing provisions of the State and Federal Constitutions.

(h) It arbitrarily discriminates as between the vendors and purchasers of such articles, in that it prohibits two or more vendors from agreeing among themselves to establish a reasonable price for such articles of merchandise, but does not prohibit the purchasers from agreeing to fix a price at which they may purchase said articles, and tends to assure, and does assure, to purchasers such prices as may be established by unhealthy and ruinous competition, but does not assure to the vendors protection or the right to protect themselves, by agreement or otherwise against ruinous rates established either by unwholesome or unhealthy competition or the combination of purchasers, and in each of such respects violates each of the foregoing provisions of the State and Federal Constitutions.

(i) It grants special privileges to the buyers of products of the character mentioned therein, by combination or otherwise, while denying to the manufacturers or vendors of the same right to protect themselves against such combination, or assuring themselves of the means of realizing a reasonable profit for their capital, labor and skill, and in each of such respects it violates each of the foregoing provisions of the State and Federal Constitutions.

(j) It arbitrarily discriminates between different classes of products and between labor and capital, between different kinds of insurance companies, and between different kinds of insurance, and also between different classes of persons, and in each of such respects violates each of the foregoing provisions of the State and Federal Constitutions.

(k) It applies to commodities and not to labor and other matters which may be the subject of combination, and thereby discriminates arbitrarily.

3. Respondent reavers each and every allegation set forth in division two of this return, and further respectfully shows that the informant claims that under the laws of this State and the construction of the statutes the respondent in

a quo warranto proceeding cannot attack the constitutionality of an act of the Legislature, the provisions of which are involved and sought to be enforced in said quo warranto proceedings, without admitting a violation of the said statute. And the informant claims that this court has so decided in the case of *State ex inf. Crow, Attorney-General, v. Firemen's Fund Insurance Company*, 152 Mo. 1. If any such contention be so maintained, or any such rule be so made, or any such statute be so construed, it will and does result in the State depriving this respondent of its property without due process of law, and will and does deny to respondent the equal protection of the laws, all contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States, hereby and herein invoked.

4. If this be or is intended to be an action to dissolve or annul an unlawful combination or conspiracy, as it appears to be from the averments of informant, or to directly enforce the provisions of any of sections 8965, 8966, 8967, 8971, 8972 or 8978 of the Revised Statutes of Missouri of 1899, then this court has no jurisdiction of such action, for that no original jurisdiction is conferred upon it by the Constitution of this State, or by the statutes thereof, and hence this proceeding does not constitute due process of law, and is in violation of the Fourteenth Amendment to the Constitution of the United States, the provisions of which are hereby invoked.

5. Among other things, the relief sought in this case and the penalties prescribed by chapter 143 of the Revised Statutes of Missouri of 1899, upon which this action is based and to enforce which statutory provision this action is instituted, in that none of the property purchased, owned, held and used by the respondent within the State of Missouri can hereafter be used by any person, whether it be the respondent or a successor or assign thereof, for any purpose, without incurring the penalties prescribed in section 8972. Upon

the faith and in the reliance of the certifiate granted to it by the State of Missouri, to do business in the said State, as averred in the information, this respondent, long prior to the enactment of said chapter 143 or of those portions thereof sought to be enforced and which lie at the base of this proceeding, invested large sums of money in the acquisition of real estate at various points in said State, and expended still larger sums of money in erecting thereon structures and appliances suitable for the conduct of the business it was authorized to do in said State under the certificate aforesaid. Said property is peculiarly adapted to the business of this respondent, and is not valuable to any appreciable extent for any other business or purpose whatsoever, and, if the same cannot be used by this respondent or its successors or assigns for the purpose for which it was bought and constructed, and for which it is valuable and suitable, as aforesaid, the value thereof would be almost wholly destroyed, to wit: at least to the extent of 90 per cent thereof. Wherefore, the respondent says that the provisions of said section 8972, above mentioned, are in violation of sections 4 and 30 of article 2 and section 53 of article 4 of the Constitution of Missouri, and of section 8 of article 1, and the Fifth and Fourteenth amendments to the Constitution of the United States, each and every provision of which this respondent now hereby expressly invokes in its behalf, for that the effect of said statutes and of the enforcement thereof by granting the relief prayed by the present cause will be to deprive the respondent of its said property and its use without due process of law, to deny to this respondent the equal protection of the law, and to deprive it of life, liberty and property without due process of law, deprive respondent of the natural right of life, liberty and the enjoyment of the gains of its own industry, grant special and exclusive rights, privileges and immunities to others and interfering with respondent continuing to buy and sell

products in and ship products as articles of commerce to and from foreign nations and different States. Said properties are used in the conduct of interstate commerce, so that the prohibition of the use thereof operates as a regulation of interstate commerce and as a restraint upon commerce among the several states and territories and with the District of Columbia, within the meaning of the act of Congress of July 2, 1890, which act of Congress, by the express terms of the Constitution of the United States, constitutes a part of the supreme law of the land, having been passed by Congress by virtue of the power granted by the Federal Constitution. Said section 8972 is a part and parcel of an entire and complete system and the unconstitutionality of the above named mentioned provision destroys the entire chapter, or at least the article on which this action is based.

In complying with the laws of this State and in obtaining certificates and licenses to do business therein, as mentioned and set forth in the information, respondent paid money to the State of Missouri, which has been held and used by the said State, and on the faith of the statutes authorizing it to do business and the licenses issued, as stated in the information, respondent invested large sums of money in the State of Missouri. The licenses and rights to do business so granted by and acquired under the laws of Missouri were without any right or reservation on the part of the State to amend, alter or repeal the same. Among other rights thereby granted by the State to the respondent was one to make any and all reasonable contracts and agreements. No other kind of a contract was ever made by this respondent. Each of the provisions of sections 8965, 8966, 8967, 8968, 8971, 8972 and 8978 of the Revised Statutes of Missouri of 1899 impaired the obligations of the contracts made as aforesaid with the State of Missouri, whereby the provisions of section 10 of article 1 of the Constitution of the United States are violated.

B.

SPECIFICATIONS OF ERROR.

A judgment has been entered in above entitled cause, fining it in the sum of fifty thousand dollars, and ousting it from the right to do business in the State. The court in its judgment erred.

1. In denying to respondent the protection of the Constitution of the United States and amendments thereto in each of the respects claimed in its amended answer and return, and also in its motion for rehearing.

2. The court held that this was a civil proceeding and that it had no criminal jurisdiction. It then, in addition to an ouster, adjudged that this respondent should pay a fine of $50,000. This fine was at least the exercise of criminal jurisdiction in an original proceeding which was beyond the court's power and jurisdiction. The court thereby takes from respondent its property without due process of law, discriminates against respondent, and refuses to accord to it the equal protection of the law, all of which is contrary to the Fourteenth Amendment to the Constitution of the United States.

3. The judgment of ouster is also an exercise of power by way of original jurisdiction in a criminal cause, in view of the forfeiture and penalties imposed by section 8972 (Revised Statutes, 1899), and sections 8969 and 8975 of the Laws of 1907. These sections and the judgment ordered impair the obligations of a contract, take property without due process, abridges the privileges of respondent and fails to accord to it the equal protection of the law, all contrary to the Fourteenth Amendment to the Constitution of the United States and section 10 of article 1 of the said Constitution.

4. Sections 8983, 8984 and 8985 were by this court upheld as constitutional, whereas respondent claimed and still claims that they violate the Fourteenth Amendment to the Constitution of the United States in that they deny to it the equal protection of the law, abridge its privileges and immunities as a citizen and also deprive it of its property without due process of law, in that there was a threatened penalty of a judgment against it if it did not comply with the order.

5. Sections 8965, 8966, 8967, 8971, 8972 and 8978 were repealed by the Laws of 1907, and after the institution of this suit new sections enacted in lieu thereof. It is true that the new law provides that the penalties incurred under the old law should not be affected. In as much as the Legislature cannot constitutionally grant to this court power to impose any forfeiture or fine, the reservation has, and can have, no application to proceedings pending here. Hence, the statutes here enforced (sections 8965, 8966, 8967, 8971 and 8978) have been repealed and to now enforce the same against respondent is to take its property without due process of law, abridge its privileges and immunities as a citizen and to deny to it the equal protection of the law, abridge its privileges and immunities as a citizen and to deny to it the equal protection of the law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

6. The law as amended (Laws 1907, p. 377, et seq.) forbids an imposition of both a fine and a judgment of ouster or revocation of a license. The penalty is in the alternative. Such would be the relief as against others, Hence, when this court adjudged both a fine and a forfeiture, it denies to respondent the equal protection of the law and takes its property without due process of law, all contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States. (Record, pp. 479-482.)

C.

STATEMENT OF FACTS.

The following statement of facts, in connection with others, was found by the court to be true:

The Standard Oil Company of New Jersey, which will hereafter be called the New Jersey Company, is a corporation organized under the laws of New Jersey, with a capitalization of $110,000,000.

The Waters-Pierce Oil Company is a corporation organized under the laws of this State, with a capitalization of $400,000.

The Standard Oil Company of Indiana is a corporation organized under the laws of Indiana, capitalized at $1,500,000.

The Republic Oil Company is a corporation organized under the laws of New York, with a capital of $350,000.

The New Jersey Company owns practically all of the stock of the Indiana Company; sixty per cent of the stock of the Waters-Pierce Company, and all of the stock of the Republic Company. The New Jersey Company also owns practically all of the stock of several other oil companies, organized under the laws of various states. Mr. H. Clay Pierce owns the remaining forty per cent of the stock of the Waters-Pierce Company.

Practically all of the officers and directors of the Indiana Company and of the Republic Oil Company are either officers, directors or employes of the New Jersey Company; and a majority of those of the Waters-Pierce Company bear the same relation to the New Jersey Company.

The main office of the New Jersey Company is located at 26 Broadway, New York City; that of the Indiana Com-

pany is located at the same place; that of the Republic Company is located in Cleveland, Ohio; and that of the Waters-Pierce Company is in St. Louis.

The three latter companies kept books, papers and records at their main offices, showing full and complete transactions of each day's business, and each of them made full and complete reports of all of their business transactions to the New Jersey Company, even to the smallest detail. The business, books and accounts of each of those three companies are regularly inspected and audited by an auditor of the New Jersey Company twice a year.

These reports embraced, among other things, the sales and delivery of refined oils, deliveries of lubricating oils, comparative sales, deliveries of special oils, deliveries of outside oils, deliveries of wax candles, tank, wagon and milk can deliveries, sales and delivery of naphtha, marine sales, total sales and net results, semi-annual statements showing costs of barreling and making all kinds of oils and products of petroleum.

A daily cash statement was sent. These cash statements were turned over to the comptroller of the Standard Oil Company of New Jersey.

All of said companies deal in petroleum and the various by-products thereof. The New Jersey and Indiana Companies are producers and refiners of oil and are manufacturers of the various by-products thereof. The Republic Company for a year or so after its organization was also a producer and refiner of petroleum and a manufacturer of various by-products thereof, but was not manufacturing or refining at the time this suit was instituted. The Waters-Pierce Company has never produced or refined oil in this country, but is doing so in the Republic of Mexico.

The Indiana Company owns and operates a large refinery in Indiana and one at Kansas City, Missouri, and a third in the state of Kansas.

The Indiana, Waters-Pierce and Republic Companies are all vendors of refined oils and the by-products of petroleum. The two latter procure all of their supplies from the former.

There are several other oil companies doing business in this State, called "independent companies."

In 1878, by agreement between the Standard Oil Company and the Waters-Pierce Oil Company, there was the following division of territory made between them: Beginning at a point on the Mississippi river on the southern boundary of Lincoln county, thence in a western direction along the southern boundaries of Lincoln, Pike, Ralls, Monroe and Randolph counties; thence in a southwest direction along the eastern boundaries of Howard, Cooper, Pettis, Benton, St. Clair and Barton counties; and thence west along the southern boundary of Barton county to the Kansas line.

Under that agreement the Indiana Company took the territory lying north of that dividing line, and Waters-Pierce took that lying south of it. The latter company was also given Arkansas, Indian Territory, Oklahoma, Texas, Louisiana and the Republic of Mexico. This division of territory has been respected from the time it was made to the present, and neither the Waters-Pierce Company, upon the one hand, nor the New Jersey Company, upon the other hand, nor any of its subsidiary corporations, which include the Indiana Company, Standard Oil Company of Ohio, Consolidated Tank Line Company, Standard Oil Company of Kentucky, and the Standard Oil Company of Iowa have ever invaded each other's territory in quest of trade, except as will now be stated.

The Republic Company was the successor of the Schofield, Shurmer & Teagle Oil Company of Cleveland, Ohio, which was one of the independent companies, and the most

active competitor the Indiana and the Waters-Pierce Company had in this State. It had its own refineries, and refined and sold high grades of oil in all parts of the State and throughout the middle west generally. After the New Jersey Company had acquired the Schofield, Schurmer & Teagle interests, it caused the Republic Company to be organized, which took over the assets and property of the former, and continued to refine oil for a short time, and sold it in the same territory its predecessor had done. Not long after the organization of the Republic Company it ceased to refine oil, and its refineries were dismantled, and, after that, it procured all of its oil and supplies from the Indiana Company, and continued to sell oil in Missouri as before, with this limitation—it would compete vigorously for the trade of all of the independent companies, but never competed for the trade of the Indiana Company, nor for that of the Waters-Pierce Company, except upon three or four occasions, whereupon vigorous protests were entered by the Waters-Pierce Company to the New Jersey Company, which resulted in smothering out all competition between the Waters-Pierce and Republic Companies. And it may not be out of place to here state that the latter company, from its organization up to the time of the institution of this suit, masqueraded under and sold oils as one of the independent companies, and thereby caused the public to believe that it was an independent company.

The Indiana Company sells in the territory lying north of the dividing line, and not south of it, while the Waters-Pierce Company sells south of that line, and not north of it. All orders for oil received by the Indiana Company to be delivered in the Waters-Pierce Company's territory are turned over to the latter and by it filled; and all orders received by Waters-Pierce for oil to be delivered in the territory of the Indiana Company are turned over to the

latter, and by it filled. Whenever through mistakes or design the agents of either of those companies sells oil within the territory of the other, the transaction is turned over to that company and it reaps the benefit thereof.

Neither the Indiana Company nor the Waters-Pierce Company will sell to the independent companies except at retail prices; and both of them have waged a most relentless war against the independents by a system of espionage and rebates given upon sales of goods.

The oil for the Indiana Company, and all other subsidiary companies of the New Jersey Company, is transported through pipe lines and tank cars belonging to the latter company; while the oil for the Waters-Pierce Company is transported in tank cars, about one-half of which are owned by it, and the other half is owned by the New Jersey Company, which aggregate, if we correctly understand the record, about one hundred and thirty cars. But neither of the said companies will permit any of the independent companies to transport oil through the pipe lines or in their tank cars.

The Indiana Company, Waters-Pierce Company and the Republic Company all sell the same oils and grades of oil under different names or brands; each company having its own names or brands for the oils sold by it.

Prices for the products of petroleum, especially refined oils, illuminating and gasoline, are fixed by the Waters-Pierce Company.

It sends out to the trade card quotations, giving tank, wagon and barrel prices. As a rule, those prices are followed by all other oil companies, including the independent companies doing business in this State. As long as the independent companies do not reduce prices or increase the aggregate amount of their sales above ten or fifteen per cent of the entire amount of the sales made in the State, there is no war made upon them regarding prices; but when-

ever any independent company reduces prices below those fixed by Waters-Pierce, or whenever their aggregate sales exceed fifteen per cent of all sales made in the State, a vigorous warfare is waged against them, chiefly through the Republic Company, by means of an elaborate system of espionage in their business and cutting prices or giving rebates until the independents are glad to throw up their hands and say "enough," and be content to sell oil at the prices and in the quantities prescribed by the Waters-Pierce Company and acquiesced in by the Indiana and Republic Companies. And as a result of this method, the Waters-Pierce Company fixes the prices for which all such oils are sold in the State, by all dealers, including the independent companies, and, at the same time and by the same means, it controls and monopolizes for itself and the Indiana and Republic Oil Companies from eighty-five to ninety-five per cent of the entire oil business of the State.

The large capital, the means of transportation and the capacious and convenient storage capacity, taken in connection with the almost perfect and far-reaching delivery systems owned, possessed and controlled by the Indiana, Republic and Waters-Pierce Companies, enable them to carry out the business methods above mentioned.

All of the dividends of the Indiana, Republic and Waters-Pierce Companies were paid either directly or indirectly into the treasury of the New Jersey Company, except, however, those which were paid on the forty per cent of the stock of the Waters-Pierce Company owned by Mr. Pierce—those dividends were paid to Mr. Pierce, which were about seven hundred per centum per annum on the capitalization of $400,000. This $400,000, however, was not the entire assets of the Waters-Pierce Company. Its total assets amounted to about $12,000,000, which sum, if added to the estimated value of the "name and good will" of the con-

cera, the total assets would be swollen to the sum of $45,000,000.

The record seems to be silent as to the value of the assets of the New Jersey, Indiana and Republic Companies; nor does it disclose the amount of the annual dividends which have been paid by those companies.

It was a common and frequent occurrence that officers, directors and employes of the New Jersey Company and all its allied corporations, including the Waters-Pierce Company, were transferred from one of said companies to another, either by election or contract of employment.

Auditors working under Mr. Wade Hampton, general auditor of the New Jersey Company, regularly audited the books and accounts of all these companies and reported results to him at 26 Broadway, New York City. The salaries of these auditors were fixed by Mr. Hampton, and charged to the Waters-Pierce Company by him, when auditing for that company, which were paid by it, including all of their expenses. Mr. Pierce, however, testified that he had no knowledge of that fact, and that if he had known of it he would not have permitted it. This only emphasized the fact that the New Jersey Company exercised control over the Waters-Pierce Company without even consulting him.

Mr. H. M. Tilford, and succeeding him, Mr. R. H. McNall, was the commercial agent of the Waters-Pierce Company in New York, and his office was in the same rooms with the New Jersey Company, and it was through him that the business with the former company was transacted with the latter.

Mr. C. L. Nichols, president of the Republic Company, was also assistant to Mr. L. J. Drake, sales agent of the Indiana Company, both of whose offices were located at 26 Broadway with the New Jersey Company. Mr. Nichols instructed all officers, agents and employes of the Republic

Company to inform the trade that said company was an independent company and had no connection whatever with the New Jersey Company. This was done in order that it might sell oils to all persons who would not deal with the New Jersey, Waters-Pierce or other Standard Oil Companies. The bringing of this suit exposed the relations existing between the New Jersey and Republic Company, which destroyed its usefulness and necessitated its going out of business.

The same relations and conditions existing in this State between the Waters-Pierce Company and the New Jersey Company and its subsidiary corporations also existed between them in Texas, Oklahoma and Arkansas, with the exception that Waters-Pierce had those states as its exclusive territory.

The officers of all the respondents knew the stock of their respective companies was either owned or controlled by the New Jersey Company, as before stated. (Record, pp. 392-397.)

PART II.

ASSIGNMENTS NOT REVIEWABLE.

I.

ASSIGNMENTS NOT REVIEWABLE.

In view of plaintiff's misguided endeavor to preserve for review numerous non-federal questions, and in an effort to pave the way to the subjects which we are called upon to consider, we shall, as a preliminary, dispose of such phases by directing attention to certain well established principles which preclude this court from reviewing same.

A.

IT IS ELEMENTARY THAT ONLY FEDERAL QUESTIONS CAN BE CONSIDERED BY THE SUPREME COURT OF THE UNITED STATES IN REVIEWING THE JUDGMENT OF A STATE COURT.

Chicago Ins. Co. v. Needles, 113 U. S. 574.

Cornell University v. Fiske, 136 U. S. 152.

Barbier v. Connolly, 113 U. S. 27.

B.

WHETHER A STATUTE IS REPUGNANT TO THE STATE CONSTITUTION IS NOT A FEDERAL QUESTION, BUT ONE WHICH BELONGS EXCLUSIVELY TO THE STATE COURT AND THE DECISION OF THAT COURT IS CONCLUSIVE HERE.

The application of this rule is so uniformly recognized as to admit of denial in no case.

Poyras de la Laude v. Louisiana, 18 How. 192.

Re Kemmler, 136 U. S. l. c. 447.

Layton v. Missouri, 187 U. S. 356.

Levy v. San Francisco City & County Sup. Ct., 167 U. S. 175.

Mobile Transportation Co. v. Mobile, 187 U. S. 479.

Rassmussen v. Idaho, 181 U. S. l. c. 200.

Montana Co. v. St. Louis Mining & Milling Co., 152 U. S. 160.

In passing upon this question the court in *re Kimmler,* 136 *U. S. l. c.* 447, said:

> "The decision of the state court, sustaining the validity of the act under the State Constitution, is not re-examinable here."

Again, in *Rassmussen v. Idaho,* 181 U. S. l. c. 200, it is said:

> "The judgment of the Supreme Court of Idaho establishes that there is no conflict between this legislation and the Constitution of the State, and it is not within the province of this court to review that question."

Also, in the case of *Merchants Bank v. Pennsylvania,* 167 U. S. l. c. 462, 463, Mr. Justice Brewer, in delivering the opinion of the court, declared:

> "It is sufficient to say in reference to this contention that the decision of the Supreme Court of the State of Pennsylvania, sustaining the statute is conclusive in this court, as to any question of conflict between it and the State Constitution. *West River Bridge Co. v. Dix,* 6 How. 507; *Bucher v. Cheshire Railroad,* 125 U. S. 555; *Bell's Gap Rail-*

road v. Pennsylvania, 134 U. S. 232; *Lewis v. Monson*, 151 U. S. 545; *Adams Express Co. v. Ohio*, 165 U. S. 194; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685."

THE SUPREME COURT OF MISSOURI HAS, ON NUMEROUS OCCASIONS, SUSTAINED THE VALIDITY OF THE ANTI-TRUST LAWS UNDER WHICH PLAINTIFFS IN ERROR ARE BEING PROSECUTED, THE SAME BEING JUSTIFIED AS A PROPER EXERCISE OF THE POLICE POWER OF THE STATE.

State ex inf. v. Firemen's Fund Ins. Co., 152 Mo. 1.

State ex inf. v. Continental Tobacco Co., 177 Mo. 1.

State ex rel. v. Armour Packing Co. 173 Mo. 356.

State ex inf. v. Standard Oil Co., 194 Mo. 148.

State ex inf. v. Standard Oil Co., 218 Mo. 1.

C.

LIKEWISE THE PROPER CONSTRUCTION TO BE GIVEN A STATUTE, AND AS TO WHAT IS TO BE REGARDED AS WITHIN ITS TERMS, PRESENTS NO FEDERAL QUESTION.

The interpretation, application and scope of a state statute, as determined by the highest court of the State, is uniformly accepted by this court as final.

Phoenix Ins. Co. v. Gardner, 11 Wall. 204.

Morley v. Lake Shore Company, 146 U. S. 162.

Standard Oil Co. v. Tennessee, 217 U. S. 413.

Smiley v. Kansas, 196 U. S. l. c. 454, 455.

Waters-Pierce Oil Co. v. Texas, 177 U. S. l. c. 42.

St. L., I. M. & S. P. Ry. Co. v. Paul, 173 U. S. 404.

Armour Packing Co. v. Lacey, 200 U. S. l. c. 236.

In the case of *W. W. Cargill Co. v. Minnesota*, 180 U. S. 466-7, Mr. Justice Harlan, discussing this rule of practice, said:

> "The questions just stated are questions of local law, and in determining whether the statute violates any right secured by the Federal Constitution we must, in the particulars named, accept the interpretation put upon it by the State court. In *Tullis v. Lake Erie & Western Railroad*, 175 U. S. 348, 353, the question was as to the constitutionality of a statute of Indiana, relating to railroads and other corporations, except municipal corporations. The Supreme Court of that state held that the statute was capable of severance, and that its provisions as to railroads were not so connected in substance with the provisions relating to other corporations that their validity could not be separately determined. This court followed that view, declaring it to be an elementary rule that it should adopt the interpretation of the statute of a state affixed to it by the court of last resort thereof. See, also, *Mo. Pac. Ry. Co. v. Nebraska*, 164 U. S. 403, 414, *Chicago, Milwaukee, etc., Railway Co. v. Minnesota*, 134 U. S. 418, 456; *St. Louis, Iron Mountain, etc., Railway Co. v. Paul*, 173 U. S. 404, 408."

D.

THE QUESTION AS TO WHAT PENALTIES ARE PRESCRIBED BY THE LAWS OF MISSOURI FOR VIOLATIONS OF THE ANTI-TRUST ACT INVOLVES ONLY THE EXERCISE OF JUDICIAL INTERPRETATION AND IS NOT REVIEWABLE.

As to whether the State Constitution and statutes prescribe as a penalty both a forfeiture and fine, or authorize the infliction of both such penalties in a proceedings of this nature, is wholly a matter of interpretation and is within the rule heretofore announced, as is shown by the authorities cited under the preceding point.

In construing the law of Missouri with respect to this phase, the Supreme Court, at page 471, says:

> "For every offense against our laws we can say to them that we will take their license, and, in addition thereto, to affix a fine. This is as far as we can go. Their *existence* as a corporation (referring to foreign corporations), we cannot reach; their corporate life we cannot take; contracts which they have made and business which they have outside of Missouri, they can proceed to transact.
>
> * * * * * * * *
>
> It is true that, as a matter of law, we can take its corporate franchise for a violation of our laws (referring to domestic corporations). We can go even further and add a fine as penalty."

In dealing with the penalties provided for by the anti-trust laws of Texas, this court, in *Waters-Pierce Oil Co. v. Texas*, 212 U. S. l. c. 111, said:

> "The fixing of punishment for crime or penalties for unlawful acts against its laws is within the police power of the State. We can only interfere with such legislation and judicial action of the State courts enforcing it if the fines imposed are so grossly excessive as to amount to a deprivation of property without due process of law. *Coffey v. Harlan County*, 204 U. S. 659."

In this case it is not contended that the penalties imposed are so *excessive* as to constitute a taking of the plaintiff's property without due process of law. That is not the basis of the complaint and has no foundation in fact.

The case of *Coffey v. Harlan County*, 204 U. S. 659, involved the validity of a statute which provided that any one embezzling public money shall be imprisoned, and, in addition thereto, shall pay a fine equal to double the amount embezzled, which shall operate as a judgment for the use of the person whose money was embezzled.

In sustaining the constitutionality of this act, Mr. Justice Moody, speaking for the court, said:

> "It is within the power of the State to enact laws creating and defining crimes against its sovereignty, regulating the procedure in the trial of those who are charged with committing them, and prescribing the character of the sentence which shall be awarded against those who have been found guilty. In these respects the State is supreme and its power absolute, and without any limits other than those prescribed by the Constitution of the United States. The exercise of the power of the State in this field cannot be drawn in question in this court or elsewhere than in its own courts, except

for the purpose of restraining it within the limits thus established."

* * * * * *

"As part of the consequences of a conviction of the crime of embezzlement by a public officer, the law of Nebraska provides that a fine double the amount embezzled shall be inflicted, which shall operate as a judgment against the estate of the convict. It is not of the slightest importance whether this fine be called a penalty, a punishment or a civil judgment. Whatever it is called, it comes to the convict as the result of his crime."

In the case of *Missouri Pacific Railway Co. v. Nebraska*, 164 U. S. l. c. 414, Mr. Justice Gray, speaking for the court, said:

"The Supreme Court of Nebraska has construed this statute as authorizing the Board of Transportation to make the order questioned in this case." * * *

"The construction so given to the statute by the highest court of the State, must be accepted by this court in judging whether the statute conforms to the Constitution of the United States."

E.

THE DECISION OF THE STATE COURT THAT, ACCORDING TO THE RULES OF PRACTICE AND PROCEDURE IN MISSOURI PROCEEDINGS IN THE NATURE OF QUO WARRANTO ARE OF A CIVIL NATURE, IS CONCLUSIVE.

The construction placed upon the statutory and constitutional provisions relating to proceedings in the nature of quo warranto that such proceedings are civil and not criminal in their nature, is binding on this court.

In delivering the opinion of the court in the case of *Wood v. Brady*, 150 U. S. l. c. 23, Mr. Justice Brown, speaking to a similar question, declared:

> "The question whether an action to foreclose a lien of this kind is *in rem* or *in personam*, under the practice in California, is one upon which the decision of the Supreme Court is binding, and its ruling that plaintiff, being no party to defendant's suit to foreclose, had a right to show by evidence *aliunde* the invalidity of the judgments obtained by them, is not a proper subject for review by this court."

In *Brown-Foreman Co. v. Ky.*, 217 U. S. l. c. 571, this court said:

> "But the Kentucky Court of Appeals has construed the act as not a property tax, but as one imposing a license or occupation tax upon the business. * * * Such a construction and interpretation of the statute here involved by the highest court of the State should be accepted as definitely determining that the tax complained of is not a property tax, but a license tax imposed upon the doing of a particular business plainly subject to the regulating power of the State."

F.

THE HIGHEST COURTS OF MISSOURI HAVE UNIFORMLY CONSTRUED SUCH PROCEEDINGS TO BE OF A CIVIL NATURE.

Judge Graves, in *State ex rel. Delmar Jockey Club*, 200 Mo. l. c. 70, speaking to the points that such proceedings are not criminal; that fines and other penalties can be imposed, and that the Supreme Court of Missouri has jurisdiction, said:

> "These proceedings are no longer recognized as criminal proceedings and have not been so recognized since the early days of the common law, but we have continually imposed what are called 'fines,' a term, no doubt, coming down from the time when the proceeding was looked upon as a criminal proceeding. The implied contract with the State, when the charter was given respondent, was that it would exercise and use the granted rights; that it would use none other, or, stated otherwise, that it would not usurp other rights; that it would rightfully use the powers granted, and not misuse them. A willful failure of either of these covenants with the State will authorize a forfeiture, and why not a fine? We forfeit for nonuser, and why? Because there has been failure to perform the obligations to the State; because there has been a violation of the contract with the State. Misuser is likewise a violation of the implied agreement with the State. So is usurpation. Each are but violations of the implied contract with the State, and for these violations we declare forfeitures. Why not fix penalties and pun-

> ishments in the one as in the other? The gist of each in quo warranto is the willful violation of the rights of the State under the implied contract, and not the violation of some criminal law, for we do not try criminal cases and affix criminal punishments in quo warranto proceedings. The violation of a corporation's contract with the State by misuser or usurpation may be evidenced by the fact of the violation of some statute, criminal in character, but in this kind of a proceeding we try the right of the corporation to further hold its franchises, not the question of finding its guilt or innocence under the statute and fixing punishment permitted by the statute. It is the only way the State has of preventing the abuse of the confidences it has reposed in these corporate creatures which are of its own making. This abuse may be by nonuser, misuser or usurpation, but, in our judgment, the State has the same rights in each event, both as to the forfeiture and the fine.' (Also, see *State ex inf. v. Equitable Loan & Inv. Assn.*, 142 Mo. 325; *State ex inf. v. Armour Packing Co.*, 173 Mo. 356; *Waters-Pierce Oil Co. v. State of Texas* (Texas Civ. App.), 106 S. W. 918; *Stockwell v. U. S.* 13 Wall. 531.)"

In the case at bar, p. 353 (Record, pp. 366, 367), Judge Woodson, after citing and discussing a multitude of cases relating to this question, concludes, as follows:

> "And it is wholly immaterial, and the corporation cannot justify or defend its conduct in that regard by a plea, that such conduct was a violation of the criminal laws of the State, by which it and

its officers and agents are rendered amenable to the penalties and punishments thereof.

In other words, the laws of the State authorize and direct the Attorney-General to institute civil proceedings by information in the nature of quo warranto against any corporation to annul its charter and forfeit its franchises whenever it has by misuser, nonuser or usurpation of power, so conducted itself as to violate the laws of its being or the criminal laws of the State. If, upon trial, the corporation is found guilty, a decree of forfeiture must go, and the court has the power, in addition, to impose penalties for such violations of the laws as it may deem proper. This, however, does not proceed upon the theory that the corporation has been guilty of a crime and that it is being punished therefor; but upon the idea that there is an implied or tacit agreement on the part of every corporation, by accepting its charter and corporate franchises, that it will perform its obligations and discharge all its duties to the public, and that by failing to do so it commits an act of forfeiture which may be enforced by the State in the manner before suggested. (*State ex inf. v. Delmar Jockey Club*, 200 Mo. l. c. 70.)

In addition thereto, the Legislature has the unquestionable power and authority to declare the acts which will work a forfeiture of the charter shall also constitute a crime, and subject the corporation and its agents and servants to punishment under the criminal laws of the State. (*Stockwell v. United States*, 13 Wall. 531; *Waters-Pierce Oil Company v. State of Texas* (Texas Court of Civil Appeals), 106 S. W. 918; *State ex inf. v. Delmar Jockey Club*, 200 Mo. l. c. 50 to 55).

It must, therefore, follow from what has been said, that this is not a criminal prosecution, as contended for by respondents; nor is the procedure provided for in section 8971, Revised Statutes, 1899, the exclusive remedy available to the State to correct abuses and usurpation of powers by corporations doing business in this State."

G.

THE JUDGMENT OF A STATE COURT, RESPECTING THE EXTENT OF ITS ORIGINAL JURISDICTION IN QUO WARRANTO PROCEEDINGS AND IN DEALING WITH MATTERS UNDER STATE LAW, IS NOT REVIEWABLE HERE.

This involves merely a construction of a State statute and Constitution and local laws of practice and procedure. It is these laws, alone, that determine and prescribe the jurisdiction of the various state courts, direct that a case, under given circumstances, shall be tried in one forum instead of another, and determine by what process legal rights may be asserted or legal obligations be enforced. Such questions belong exclusively to the State courts.

Maxwell v. Dow, 176 U. S. 581.

Smith v. Adsit, 16 Wall. l. c. 189.

Tripp v. Railroad, 144 U. S. 126.

Iowa Central Ry. Co. v. Iowa, 160 U. S. 389.

Cincinnati Street Ry. Co. v. Snell, 193 U. S. l. c. 35, 38.

Hooker v. Los Angeles, 188 U. S. l. c. 319.

Twining v. New Jersey, 211 U. S. l. c. 110, 113.

C., B. & Q. R. R. v. Chicago, 166 U. S. l. c. 226.

Brown v. New Jersey, 175 U. S. 172.
League v. Texas, 184 U. S. l. c. 158.
Cackus v. Union Depot Co., 169 U. S. l. c. 570.

That a State has full control over the practice and procedure to be pursued in its courts, and to fix and determine the jurisdiction of its courts, has often been adjudged.

Thus, in *Missouri v. Lewis*, 101 U. S. l. c. 31, it was said by Mr. Justice Bradley, speaking for the court:

> "We might go still further and say with undoubted truth that there is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory."

Again, in *Ex parte Reggel*, 114 U. S. l. c. 651, Mr. Justice Harlan used these words:

> "That commonwealth (Pennsylvania) has the right to establish the forms of pleadings and process to be observed in her own courts in both civil and criminal cases."

Also, Mr. Chief Justice Fuller, speaking for the court in *Hooker v. Los Angeles*, 188 U. S. l. c. 318, 319, declared:

> "The Fourteenth Amendment does not control the power of a State to determine the form of procedure by which legal rights may be ascertained, if the method adopted gives reasonable notice and affords a fair opportunity to be heard. *Iowa Central R. R. Co. v. Iowa*, 160 U. S. 389; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685.
>
> The construction of a law of a State that it was competent for the court to try and determine in a

condemnation proceeding, an adverse claim of the plaintiff therein to an interest in property sought to be condemned, is conclusive on this court."

In the case of *Waters-Pierce Oil Co. v. State of Texas*, 212 U. S. Rep. l. c. 107, it is said:

> "That State legislatures have the right to deal with the subject matter and to prevent unlawful combinations to prevent competition and in restraint of trade, and to prohibit and punish monopolies, is not open to question. *National Cotton Oil Co. v. Texas*, 197 U. S. 115; *Smiley v. Kansas*, 196 U. S. 447. Having the power to pass laws of this character, of course, the State may provide for proceedings to enforce the same. The State, keeping within constitutional limitations, may provide its own method of procedure and determine the methods and means by which such laws may be made effectual. 'The limit of the full control which the State has in a proceeding of its courts, both in civil and criminal cases, is subject only to the qualifications that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution.' *West v. Louisiana*, 194 U. S. 258, 263; and see *Davis v. Texas*, 139 U. S. 651; *Brown v. New Jersey*, 175 U. S. 172, 175; *Allen v. Georgia*, 166 U. S. 138, 140; *In re Converse*, 137 U. S. 624, 632, and *Twining v. New Jersey*, 211 U. S. 78, decided at this term of court, where the subject is fully discussed, and previous cases in this court cited."

Again, in *Smith v. Adsit*, 16 Wall. l. c. 189, Mr. Justice Strong in delivering the opinion of the court, said:

"The judgment of the State court respecting the extent of its equitable jurisdiction is, of course, not reviewable here."

Also, Mr. Justice White, speaking for the court in *Iowa Central R. R. Co. v. Iowa,* 160 U. S. l. c. 393, declared:

"It is apparent that this defense merely asserted that the rights of the corporation as a citizen of the United States would be impaired by enforcing the claim urged against it on the motion, instead of by another and less summary form of action. But it is clear that the Fourteenth Amendment in no way undertakes to control the power of a State to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided. This being the case, it was obviously not a right, privilege or immunity of a citizen of the United States to have a controversy in the State court prosecuted or determined by one form of action instead of by another. It is also equally evident, provided the form sanctioned by the State law gives notice and affords an opportunity to be heard, that the mere question of whether it was by a motion or ordinary action in no way rendered the proceeding not due process of law within the constitutional meaning of those words. Whether the court of last resort of the State of Iowa properly construed its own constitution and laws in determining that the summary process under these laws was applicable to the matter which it adjudged, was purely the decision of a question of State law, binding upon this court. Mere irregularities in the

procedure, if any, were matters solely for the consideration of the judicial tribunal within the State empowered by the laws of the State to review and correct errors committed by its courts. Such errors affect merely matters of State law and practice, in no way depending upon the Constitution of the United States or upon any act of Congress. *Ludeling v. Chaffe*, 143 U. S. 301, 305.

As said by this court, speaking through Mr. Chief Justice Fuller, in *Leeper v. Texas*, 139 U. S. 462, 468: 'Law in its regular course of administration through courts of justice is due process, and when secured by the law of the State the constitutional requirement is satisfied.' There was a 'regular course of administration' in the case at bar, as that term was employed in the case cited.

It is manifest that it was never contemplated by the framers of the Constitution that this court should sit in review, as an appellate court, of such a question as that presented by the record in the case at bar. * * *

It was not a denial of a right protected by the Constitution of the United States to refuse a jury trial, even though it were clearly erroneous to construe the laws of the State as justifying the refusal. *Brooks v. Missouri*, 124 U. S. 394; *Spies v. Illinois*, 123 U. S. 131, 166."

The contention that the Supreme Court of Missouri had no jurisdiction to hear and determine this cause, for the reason that it involved an inquiry as to whether plaintiffs in error have done acts which were in violation of the provisions of the statute for which other penalties are also prescribed, is entirely in conflict with the decisions and well established practice in this State for over half a century.

Likewise, the contention that the Supreme Court of Missouri was not authorized to both decree a forfeiture of its franchise and impose a fine.

These proceedings have never been recognized under the Constitution of Missouri as criminal proceedings, but have been from the earliest days construed as civil in their nature.

The jurisdiction of the Supreme Court in such cases is conferred by article VI, section 3 of the Constitution of the State of Missouri in the following language:

> "It shall have power to issue writs of habeas corpus, mandamus, *quo warranto*, certiorari and other remedial writs, and to hear and determine same."

The jurisdiction thereby conferred in quo warranto has been universally construed by the Supreme Court of Missouri to mean jurisdiction of an information in the *nature of a quo warranto*, and, in the exercise thereof, forfeitures have been decreed and fines imposed.

State ex rel. v. Stewart, 32 Mo. 373.

State ex rel. v. Vail, 53 Mo. 97.

State ex inf. v. Equitable Loan & Inv. Co., 142 Mo. 325.

State ex inf. v. Delmar Jockey Club, 200 Mo. 34 l. c. 51, 68-70.

State ex rel. v. Standard Oil Co., 218 Mo. l. c. 345.

In the case of *State ex inf. v. Equitable Loan & Investment Company, supra*, the Supreme Court of Missouri, speaking through Judge Sherwood, said:

> "At common law, 'the old writ of quo warranto is a civil writ, at the suit of the crown; it is not a

criminal prosecution. This was the true *old way* of inquiring of usurpations upon the crown, by holding fairs or markets, viz.: by writs of quo warranto. Then informations in the nature of a quo warranto came into use and supplied their place.' These observations fell from Mr. Justice Wilmot in *Rex v. Marsden,* 3 Burr, 1817, in the year 1765. See *High Ex. Leg. Rem.* Sec. 603. In Blackstone, written in 1758, some seven years before the last mentioned period, it is asserted that the proceeding by quo warranto 'is properly a criminal method of prosecution.' Cooley's Black., book 3, ch. 17, p. 262. But whatever the origin of the writ, whether civil or criminal, it is certain now at the present time and for a long period anterior to this, it has been and is but a civil suit. There is a distinction, of course, to be taken, a distinction pointed out by Scott, J., in *State v. Ins. Co.,* 8 Mo. 330, between a writ of quo warranto and an information in the nature of a quo warranto, but while this is true, yet it is also true even in Blackstone's time, the issuance of the writ itself, owing to its cumbersome length, had long fallen into disuse, which resulted in the modern substitutionary and more speedy method of the filing of ex officio informations by the Attorney-General. Cooley Black., book 3, ch. 17, p. 262.''

''Our Constitution provides, in the third section of its sixth article, that this court 'shall have power to issue writs of *habeas corpus, quo warranto, certiorari* and other original remedial writs, and to hear and determine the same.' In as much as the issuance of a writ of quo warranto had not occurred in England for centuries; in as much as courts,

> lawyers and text-writers had been accustomed for hundreds of years to use the expression '*writ of quo warranto*' as the legal equivalent and synonym of 'information in the nature of a *quo warranto*,' it will be presumed that the framers of our Constitution were not unmindful or ignorant of such a common form of expression and the meaning which it bore, and, therefore, when they used the words 'writ of *quo warranto*,' they intended thereby only to convey in abbreviated form the meaning that phrase had for so long a period and so continuously been employed to convey, to wit, 'informations in the nature,' etc."
>
> "Since writing the above, it has been found that in other states possessing organic laws like our own, similar conclusions have been reached. *State v. Railroad*, 34 Wis. 197, and cases cited; *State v. Gleason*, 12 Fla. 190, and cases cited; *High, Ex. Leg. Rem.*, Secs. 610, 611."

And, in the same case, in a consideration of the question as to whether an information in the nature of a quo warranto could be sustained against a corporation for a misuse or abuse of franchise by reason of its failure to comply with a statute when the Legislature had provided special penalties to be enforced in other proceedings for a violation thereof, was passed upon in the following language, l. c. 337:

> "And the jurisdiction of this court in this regard being conferred by the Constitution, it is beyond the power of the Legislature to take it away, and it will not be intended that a legislative enactment was designed to take such jurisdiction away, although such enactment should confer another and distinct remedy upon some inferior court or board.

State v. Allen, 5 Kan. 213; *State v. Massmore*, 14 Wis. 115; *Kane v. People*, 4 Neb. 509; 19 *Am. & Eng. Ency. of Law*, 664; *People v. Bristol Co.*, 23 Wend. 222; *People v. Hillsdale Turnp. Co.*, 1b. 254; *State v. Baker*, 38 Wis. 71; *High, Ex. Leg. Rem.*, Sec. 615; 2 *Spelling Ex. Rlf.*, Secs. 1772, 1873. In consequence of this well recognized principle, sections 7 and 8 of the laws of 1895, pages 31 and 32, in relation to the duties of the supervisor of building and loan associations, to institute proceedings in the circuit court against a delinquent building and loan association, and that such proceeding shall be conducted by the Attorney-General, cannot abate the jurisdiction conferred on this court by the Constitution, nor deprive the Attorney-General of his common law, and inherent powers to file ex officio informations, as in the present instance."

H.

THE QUESTION AS TO WHETHER THE PENALTY SECTION OF THE LAW UNDER WHICH THESE PROCEEDINGS WERE INSTITUTED WAS REPEALED BY A SUBSEQUENT LEGISLATIVE ACT, INVOLVES NO FEDERAL QUESTION, AND IS NOT REVIEWABLE.

This court will not consider the question as to whether the penalty section of the law in force at the time this suit was instituted was repealed by the Legislature of 1907, which was passed before final judgment herein was rendered.

These proceedings were instituted on the 29th day of March, 1905, under and in pursuance of the laws enacted in 1889 and the amendatory acts of 1891-1895. Two years thereafter, to wit, in 1907, and before final judgment was rendered in this cause, said laws were repealed, and, in lieu

thereof, other and similar laws enacted. The act of 1907 expressly provided:

> "The enactment and taking effect of this law shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred by any corporation or person on account of the violation of any law of this State prior to the taking effect of this act."

On this phase, the case of *Morley v. Lake Shore Railway* Company, 146 U. S. l. c. 166, 167, is decisive. The court says:

> "The first question we have to consider is the effect to be given to the saving clause contained in the first section of the act of June 20, 1879, which provides that nothing therein contained shall be so construed as to in any way affect any contract or obligation made before the passage of that act. This question is answered for us by the decision of the court of appeals of New York in this very case, holding that this saving clause is not applicable in the case of a judgment like the plaintiff's. In *Louisiana v. Pilsbury*, 105 U. S. 278, 294, this court, speaking by Mr. Justice Field, says: 'Whether such a construction (by judicial decisions upon a clause of the state constitution) was a sound one, is not an open question.
>
> The exposition given by the highest tribunal of the State must be taken as correct so far as contracts made under the act are concerned. . . . The construction, so far as contract obligations incurred under it are concerned, constitutes a part of the law as much as if embodied in it. So far does this doctrine extend, that when a statute of two states,

expressed in the same terms, is construed differently by the highest courts, they are treated by us as different laws, each embodying the particular construction of its own state, and enforced in accordance with it in all cases arising under it.'

'The rule of construction adopted by the highest court of the state, in construing their own constitution, and one of their own statutes in a case not involving any question re-examinable in this court under the twenty-fifth section of the judiciary act, must be regarded as conclusive in this court.' *Provident Institution v. Massachusetts*, 6 Wall. 611, 630.

'The construction given to a statute of a state by the highest judicial tribunal of such State is regarded as a part of the statute and is as binding upon the courts of the United States as the text.' *Leffingwell v. Warren*, 2 Black, 599, 603. The meaning of a state statute declared by the highest court of a state, is conclusive upon this court. *Randall v. Brigham*, 7 Wall. 523, 541. If, then, the law as enacted by the Legislature, and construed by the state judiciary, will be the law of the state, it follows that, as to the proper construction of the statute, and as to what should be regarded as among its terms, no Federal question could arise. The most that could be claimed would be that, although the statute of the state was unobjectionable, yet the state court had erroneously construed it. This would constitute a purely judicial error, involving no question of the validity of the law.''

This question, however, is immaterial, since independent of any statute, the Supreme Court of Missouri has jurisdiction in quo warranto proceedings with the consequent and

concomitant power to adjudge a forfeiture and fine. This jurisdiction and power to punish is lodged in that court by the State Constitution and cannot be destroyed by a legislative act, and that court has so declared in cases heretofore cited, as well as in the case at bar.

Even if the section referred to had been repealed, as asserted by plaintiffs, the court still had the power to render the judgment it did, and this court cannot interfere.

Waters-Pierce Oil Co. v. Texas, 177 U. S. l. c. 47.

I.

THIS COURT WILL NOT CONSIDER THE ASSIGNMENT THAT SECTION 8972, R. S. 1899, AND SECTIONS 8967 AND 8975 OF THE LAWS OF 1907, ARE INVALID.

These provisions relate only to transactions after conviction, and in no manner affect the validity of a judgment in pursuance of the anti-trust laws. They merely prohibit, under penalty, the dealing in articles, products and commodities made, produced and manufactured by corporations whose franchises have been forfeited for the violation of the anti-trust laws. While they do not have the effect assigned to them by plaintiffs in error, yet, if they did, this could afford no relief against the judgment rendered. They authorize criminal prosecution for certain acts and are separable from the anti-trust law.

In disposing of a similar question, this court, in *National Cotton Oil Co. v. Texas*, 197 U. S. l. c. 133, said:

> "But it may be said that if the inequalities of prior anti-trust acts have been removed by the act of 1899 they still remain in the Revised Statutes of the State and in the penal code, and by those statutes and that penal code the excepted classes

are exempted from indictment and punishment, while the oil company is subject to both. We need not consider the statutes referred to or consider how far this discrimination can exist, in view of the decision of the Supreme Court in *State of Texas v. Laredo Ice Company*. Granting it can exist, the case at bar is not a criminal prosecution. It involves only the anti-trust laws and their prohibitions, and penalties."

The rule in this respect is correctly stated in the Encyclopedia of Law and Procedure, Vol. 8, p. 798, as follows:

> "It is a well settled principle that the constitutionality of the statute will not be determined in any case unless such determination is absolutely necessary in order to determine the merits of the suit to which the constitutionality of such statute has been drawn in question, and then only where the part of the statute alleged to be unconstitutional is involved in the controversy and the remaining portion is incomplete and inoperative in itself."

It will be time enough to consider their validity when the State attempts to enforce such provisions.

McChord v. L. & N. Railroad Co., 183 U. S. l. c. 495, 496.

Hatch v. Reardon, 204 U. S. l. c. 160.

Patterson v. Bank, 190 U. S. l. c. 176.

Arbuckle v. Blackburn, 191 U. S. l. c. 413, 415.

Castillo v. McConnico, 168 U. S. l. c. 680.

Supervisors v. Stanley, 105 U. S. l. c. 311.

Clark v. Kansas City, 176 U. S. l. c. 118.

Reduction Co. v. Sanitary Works, 199 U. S. l. c. 318.

Another reason why this assignment is unavailable is that it was raised for the first time in the motion for rehearing, and the Supreme Court of Missouri did not pass thereon. It is well settled in this court that a review of the judgment of a state court is confined to the assignment of errors made and passed upon in the judgment of a state court brought here for review. The assignment of errors in this court cannot bring into the record any new matter for consideration.

And a Federal question cannot be raised for the first time in a petition or motion for rehearing, unless the state court actually passes thereon.

An order merely overruling or denying the motion, or basing the denial upon other grounds, does not pass upon nor preserve the question.

Harding v. Ill., 196 U. S. 78.

McCorquodale v. Texas, 211 U. S. 432.

Waters-Pierce Oil Co. v. Texas, 212 Mo. l. c. 115, 117.

Levy v. Thomas, 207 U. S. 93.

Loeber v. Schroeder, 147 U. S. 580, 585.

Pim v. St. Louis, 165 U. S. 273.

J.

NEITHER DOES THIS COURT REVIEW, BUT, ON THE CONTRARY, ACCEPTS AS CONCLUSIVE THE FINDINGS OF FACT MADE BY THE STATE COURT, AND THAT SUCH FACTS CONSTITUTE A VIOLATION OF THE LAW AS CONSTRUED.

Quinby v. Boyd, 128 U. S. 488.
Egan v. Hart, 165 U. S. 188.
Dower v. Richards, 151 U. S. 658.
Thayer v. Spratt, 189 U. S. 346.
Waters-Pierce Oil Co. v. Texas, 212 U. S. 86.
Gardiner v. Bonesteel, 180 U. S. 362.
Christman v. Miller, 197 U. S. 313.
Chapman et al. v. Bigelow, 206 U. S. 41.

In the case of *Waters-Pierce Oil Co. v. State of Texas*, 212 U. S. Rep. l. c. 106-7, which was a prosecution by the State of Texas for a violation of the anti-trust law, the court said:

> "And in the findings which we have above quoted as to the evidence, the state court has found that the defendant has been since May 31, 1900, a party to an agreement with the Standard Oil Company of New Jersey to create a monopoly and to control prices and prevent competition in Texas, and that to a large extent the object has been accomplished. These findings of fact are conclusive upon us, and show that the conviction was had, for acts and transactions committed and carried out within the State of Texas."

And in the same case, at page 97, Mr. Justice Day further said:

> "The case was submitted upon oral arguments and elaborate briefs and a voluminous record. It was argued, in many aspects, as though this were a proceeding in error to review the weight of the evidence adduced in the state courts, to re-examine the rulings of the court upon the admissibility of testimony, and to determine the effect of the statute of limitations in the state.
>
> The jurisdiction of this court to review the proceedings of the state courts, as we have had frequent occasion to declare, is not that of a general reviewing court in error, but is limited to the special instances of denial of Federal rights, whether those pertaining to the constitutionality of Federal or state statutes, or to certain rights, immunities and privileges of Federal origin, especially set up in the state court and denied by the rulings and judgment of that court. Sec. 709, Rev. Stat. U. S. Nor does this court sit to review the findings of fact made in the state court, but accepts the findings of the court of the state upon matters of fact as conclusive, and is confined to a review of questions of Federal law within the jurisdiction conferred upon this court. *Quimby v. Boyd*, 128 U. S. 488; *Egan v. Hart*, 165 U. S. 188; *Dower v. Richards*, 151 U. S. 658; *Thayer v. Spratt*, 189 U. S. 346. We shall not, therefore, undertake to follow counsel in the consideration of all questions argued, but shall limit our review to questions of a Federal nature which we deem to be properly made in this record and essential to the decision of the case."

Again, in the case of *Thayer v. Spratt,* 189 U. S. 353, it is said:

> "There is not a word of any proof showing any fraudulent act on the part of the entrymen or of their transferee, the defendant herein, and, on the contrary, there is proof of an absence of any fraud and the *bona fide* purpose on the part of the entrymen to properly avail themselves of the act of 1878.
>
> "But however this may be, we are precluded by the finding of facts in the State court from looking at the evidence upon which such findings may rest. Upon a writ of error to a State court this court has no right to review its decision upon the ground that the finding was against evidence or the weight of evidence. *Eagan v. Hart,* 165 U. S. 188; *Gardner v. Bonesteel,* 180 U. S. 362, 370; *Bement v. National Harrow Company,* 186 U. S. 70, 83; *Jenkins v. Neff,* 186 U. S. 230, 235."

In *Eagan v. Hart,* 165 U. S. l. c. 189, Mr. Justice White said:

> "The record before us contains all the testimony introduced and evidence offered in the trial court, all of which was open for consideration and passed upon by the Supreme Court of the state of Louisiana. On error, however, to a state court, this court cannot re-examine the evidence, and when the facts are found below is concluded by such finding. *Dower v. Richards,* 151 U. S. 658; *Bartlett v. Lockwood,* 160 U. S. 357; *Stanley v. Schwalby,* 162 U. S. 255, 278. True it is that in *Dower v. Richards* the court (referring to the dictum in *Republican River Bridge Co. v. Kansas Pacific Railway,* 92 U. S. 315, 317) treated as open for further consideration the

> question whether in chancery cases the power existed in this court to review the decision of state courts on both the law and the fact. We, however, conclude that not only the very nature of a writ of error, but also the rulings of this court from the beginning, make it clear that on error to a state court in a chancery case, as in a case at law, when the facts are found by the court below, this court is concluded by such findings. The adjudications are collected very fully in *Dower v. Richards* and in the subsequent cases above referred to."

In *Smiley v. Kansas*, 196 U. S. l. c. 454-5, Mr. Justice Brewer, speaking for the court, said:

> "The Supreme Court of the State held that the acts charged and proved against the defendant, were clearly within the terms of the statute, as well as within the police power of the State; and that the statute could be sustained as a prohibition of those acts, irrespective of the question whether its language was broad enough to include acts and conduct which the Legislature could not rightfully restrain. We accept the construction given to a state statute by that court."

PART III.

DISCUSSION OF FEDERAL QUESTIONS PASSED UPON BY THE STATE COURT.

I.

THE AUTHORITY OF THE STATE LEGISLATURE TO PASS LAWS PROHIBITING THE MAKING OF AGREEMENTS OR THE FORMING OF COMBINATIONS IN RESTRAINT OF TRADE, OR THE CARRYING OUT IN THE STATE OF SUCH AGREEMENTS OR COMBINATIONS, IS ABSOLUTE AND COMPLETE.

That the State of Missouri had the right to enact the statute under review and to prevent and punish agreements and arrangements in restraint of trade, or which are designed, or tend to prevent competition in the sale and manufacture of commodities and products, is no longer open to question.

Waters-Pierce Oil Co. v. Texas, 177 U. S. 28.

Waters-Pierce Oil Co., 212 U. S. 86.

Standard Oil Co. v. Tenn., 217 U. S. 415.

Standard Oil Co. v. U. S. (not yet officially reported).

National Cotton Oil Co. v. Texas, 197 U. S. 115.

Smiley v. Kans., 196 U. S. 447.

Mungler v. Kans., 113 U. S. 31.

Addyston Pipe & Steel Co. v. U. S., 175 U. S. 211.

Carroll v. Greenwich Ins. Co., 199 U. S. 410.

Joint Traffic Assn. v. U. S., 171 U. S. 338.

U. S. v. Trans-Missouri Frgt. Assn., 166 U. S. 290.

Northern Securities Co. v. U. S., 193 U. S. 197.

II.

THE STATE LIKEWISE HAS THE ABSOLUTE RIGHT TO PRESCRIBE THE PUNISHMENT FOR VIOLATIONS OF THE ANTI-TRUST LAWS.

While this involves no Federal question and is not reviewable here, as is shown by authorities heretofore cited, yet, the Legislature, having the jurisdiction to pass laws prohibiting combinations in restraint of trade, has the absolute right to prescribe the punishment for a violation of such laws, and the laws under consideration are open to no constitutional objections on account of penalties.

Waters-Pierce Oil Co. v. Texas, 212 U. S. l. c. 111.

Coffey v. Harlan County, 204 U. S. 659.

National Cotton Oil Co. v. Texas, 197 U. S. 115.

Ripley v. Texas, 193 U. S. 504.

Ohio v. Lloyd, 194 U. S. 445.

Marvin v. Trout, 199 U. S. 212.

McCray v. U. S., 195 U. S. 27.

Divine v. Los Angeles, 202 Mo. 302.

Railway v. Hume, 115 U. S. 512.

Telephone Co. v. Ind., 165 U. S. 304.

Railway Co. v. Seegers, 207 U. S. 73.

O'Neil v. Vermont, 144 U. S. 323.

N. W. L. I. Co. v. Riggs, 203 U. S. 251.

III.

THE STATUTE RELATING TO THE PRODUCTION OF BOOKS, PAPERS AND WITNESSES UPON AN ORDER OF THE COURT, AFTER DUE NOTICE AND OPPORTUNITY TO BE HEARD, DOES NOT VIOLATE ANY PROVISION OF THE FEDERAL CONSTITUTION.

Plaintiffs in error challenge the validity of sections 8983, 8984 and 8985, Revised Statutes of Missouri, 1899, which authorize the court before which an anti-trust proceeding is pending, to make an order, upon proper showing by the prosecuting officer, and after due notice and opportunity to be heard, directed to the accused for the production of books, papers and evidence.

It is contended that said sections deny plaintiffs in error the equal protection of the law, abridges its privileges and immunities and deprives it of its property without due process of law, in that there was a threatened penalty of judgment against it if it did not comply with the order made in pursuance of the authority conferred by said sections. This statute will be found at pages ——, and will not be here set out. It is practically a rescript of the Arkansas statute, which this court reviewed and upheld in the case of *Hammond Packing Company v. Arkansas*, 212 U. S. 322.

In disposing of the assignment that the action of the trial court in making the order to produce and, on failure to comply therewith, striking the pleadings of the Hammond Company from the files and rendering a judgment as by default, was void because repugnant to the equal protection and due process clauses of the Fourteenth Amendment, this court said:

"As the conduct of the trial court on the subjects with which this proposition is concerned conformed to the authority conferred by sections 8 and 9 of the statute, it follows that the proposition is that those sections are repugnant to the fourteenth amendment. The grounds which are made the basis of this proposition are numerous and are stated in various forms not separated one from the other. We shall disentangle them and treat them separately, and thus consider and dispose of them all.

"It is said, conceding that the power which section 8 confers could be exerted under just limitations, yet the order made, which was authorized by the statute, was so unlimited, so arbitrary and unjust as to cause it to be wanting in due process. This rests upon the assumption that the order to produce the books and papers of the company and the witnesses, was imperative, and did not consider the ability of the company to comply, furnished no compulsory process to compel obedience in case a named witness refused to appear at the request of the company, and therefore left the company helpless and subject to pains and penalties for a failure to do that which it may not have been in its power to do. But again the proposition rests upon the assumption that the statute and the order which conformed to it did that which the court below decided it did not do. Conceding, for the sake of the argument, that the broad provisions of section 8 and the general language of the order to produce, might on their face be amenable to the criticism which the proposition involves, the statement we have previously made demonstrates that the court below, by a construction which is binding here, expressly de-

cided that neither the statute nor the order were subject to the interpretation which the argument attributes to them. Indeed, the court impliedly conceded that, if the statute and the order meant that which the argument contends they did mean, both the statute and the order would have been void. But in intimating to that effect it was expressly held that all the statute required was a bona fide effort to comply with an order made pursuant to its provisions, and therefore any reasonable showing of an inability to comply would have satisfied the requirements both of the statute and the order. As the Hammond Packing Company absolutely declined to obey the order and stood upon what it deemed to be its lawful rights and privileges, even if that course of conduct was taken because of a contrary conception as to the meaning of the statute, it is not within our province to afford relief because of an error of judgment in this respect. That is to say, we may not hold that the statute and order were arbitrary and unjust in the particulars asserted when it is conclusively determined that they do not have that effect.

"It is insisted that the order to produce was so general and indefinite as to amount to an unreasonable search and seizure, and consequently was wanting in due process of law. But conceding, for the sake of argument only and not so deciding, that the due process clause of the fourteenth amendment embraces in its generic terms a prohibition against unreasonable searches and seizures, a question hitherto reserved, under circumstances analagous to those here present, in *Consolidating Rendering Company v. Vermont*, 207 U. S. 541, we think the ruling made

in that case establishes the unsoundness of the contention. We say this because it was in that case determined in view of the visitorial powers of a State over corporations doing business within its borders and the right of the State to know whether the business of a corporation was being carried on in a lawful manner, that it was competent for the State to compel the production of the books and papers of the corporation in an investigation to ascertain whether the laws of the State had been complied with. And of course such power embraces the authority to require the giving of testimony by the officers, agents and other employes of the corporation for like and analogous purposes. It is true that the books and papers to which the order made in the cited case related were those of a foreign corporation doing business in Vermont, and which had been kept in the State, but had been taken therefrom. But we see no reason to hold that this case is not controlled by the principle applied in the Consolidated Rendering Co. case, because the books of the Hammond Company, which were called for, may not have been at any time kept within the State of Arkansas.

"Nor do we think there is merit in the contention that the order to produce was wanting in due process because it was made in a pending suit and sought to elicit proof not only as to the liability of the company, but also the proof in the possession of the company relevant to its defense to the claim which the State asserted. As these subjects were within the scope of the visitorial power of the State and concerning which it had the right to be fully informed, the mere incident or purpose for which the lawful power was exerted affords no ground to deny

its existence. In Consolidating Rendering Co. v. Vermont, the books and papers were required for an investigation before a grand jury concerning supposed misconduct of the corporation. The power to compel the production to ascertain whether wrong had been done, in the nature of things, as the greater includes the less, is decisive as to the right to exact the production for the purpose of proof in a pending cause. See *Hale v. Henkel,* 201 U. S. 43. If, as was in that case decided, the power of visitation could be exercised, even although it might lead to the production of incriminating evidence merely because the order in this case called for evidence in the possession of the corporation relative to its defense did not affect the validity of the order.

"The contention that because section 8 applies only to books and papers outside of the State, therefore it denies the equal protection of the laws is not open, since it has been conclusively settled that, without denying the equal protection of the laws, relations may be based upon the fact that persons or property dealt with are not within the territorial jurisdiction of the regulating authority. *Central Loan & Trust Co. v. Campbell,* 173 U. S. 84. Even if, as contended, the remedy given by the act for the production of books and papers and the examination of witnesses is confined to corporations and joint stock associations, and does not extend to individuals, that fact also furnishes no ground for the proposition that a denial of the equal protection of the laws thereby resulted. The wider scope of the power which the State possesses over corporations and joint stock associations in and of itself affords a ground for the classification adopted.

"Lastly, with much earnestness and elaboration, it is urged that the action of the court, authorized by section 9, in striking the answer from the files and rendering a judgment as by default, is conclusively demonstrated to have been a denial of due process of law by the ruling in *Hovey v. Elliott*, 167 U. S. 409, and the previous cases in this court which were there cited and applied. The rule in Hovey v. Elliott was that to punish for contempt by striking an answer from the files and condemning, as by default, was a denial of due process of law, and therefore repugnant to the fourteenth amendment. There the power to strike out and punish was exerted, by the court, in virtue of what it assumed to be its inherent authority, and the occasion which caused the exercise of the assumed authority was the refusal of the defendant to comply with an order to pay into the registry of the court a sum of money which, it was held, had been illegally withdrawn, and the right to which was at issue in the suit. Merely because the power to strike out an answer and enter a default, which was exerted by the court below in this case, was authorized by the ninth section of the statute furnishes no ground for taking this case out of the ruling in Hovey v. Elliott, if otherwise controlling. The fundamental guarantee of due process is absolute and not merely relative. The inherent want of power in a court to do what was done in Hovey v. Elliott was in that case deduced from no special infirmity of the judicial power to reach the result, but upon the broad conception that such power could not be called into play by any department of the government without transgressing the constitutional safeguard as to due process, at all times

dominant in and controlling where the Constitution is applicable. Indeed in Hovey v. Elliott, the impotency of the legislative department to endow the judicial with the capacity to safeguard the Constitution was emphasized. But while this is true the question yet remains, is the doctrine of Hovey v. Elliott here applicable? To determine this question we must take into view the authority below, exerted not from a merely formal point of view, but in its most fundamental aspect. That is to say, we must trace the power to its true source, and if from doing so it results that the authority exerted flows from a reservoir of unquestioned power, it must follow that the action below was not unlawful, albeit in some narrower aspect that action might be considered as unlawful. The essential basis for the exercise of power and not a mere incidental result arising from its exertion is the criterion by which its validity is to be measured. Hovey v. Elliott, involved a denial of all right to defend as a mere punishment. This case presents a failure by the defendant to produce what we must assume was material evidence in its possession and a resulting striking out of an answer and a default. The proceeding here taken may therefore find its sanction in the undoubted right of the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer begotten from the suppression or failure to produce the proof ordered, when such proof concerned the rightful decision of the cause. In a sense, of course, the striking out of the answer and default was a punishment, but it was only remotely so, as the generating source of the power was the right to create a presumption flowing from the failure to pro-

duce. The difference between mere punishment, as illustrated in Hovey v. Elliott, and the power exerted in this, is as follows: In the former due process of law was denied by the refusal to hear. In this the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense. The want of power in the one case and its existence in the other are essential to due process, to preserve in the one and to apply and enforce in the other. In its ultimate conception therefore the power exerted below was like the authority to default or to take a bill for confessed because of a failure to answer, based upon a presumption that the material facts alleged or pleaded were admitted by not answering, and might well also be illustrated by reference to many other presumptions attached by the law to the failure of a party to a cause to especially set up or assert his supposed rights in the manner prescribed by law.

"As pointed out by the court below, the law of the United States as well as the laws of many of the States, affords examples of striking out pleadings and adjudging by default for a failure to produce material evidence, the production of which has been lawfully called for. *Revised Statutes U. S., section* 724, which was drawn from section 15 of the judiciary act of 1789, after conferring upon courts of law of the United States the authority to require parties to produce books and writings in their possession or under their control which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by

ordinary rules of proceedings in chancery, expressly empowers such courts, if the plaintiff fails to comply with the order to render a judgment of non-suit, and if a defendant fails to comply the court may, on motion, give judgment against him by default." From the time of this enactment, practically coeval with the Constitution, although controversies have arisen as to its interpretation, no contention, so far as we can discover, has ever been raised, questioning the power given to render a judgment by default under the circumstances provided for in the statute. Its validity was taken for granted by the court, speaking through Mr. Chief Justice Taney, in *Thompson v. Selden*, 20 How. 194, and this was also assumed by the court, speaking through Mr. Justice Bradley, in *Boyd v. United States*, 116 U. S. 616, where the effect of the constitutional guarantees embodied in the fourth and fifth amendments were elaborately and lucidly expounded. It is unnecessary to cite the many cases in the lower Federal courts which manifest the same result, as they will be found collated in Gould & Tucker's notes on the Revised Statutes, under section 724, and in the notes to the same section, contained in volume 3, Federal statutes annotated.

"And, beyond peradventure, the general course of legislation and judicial decision in the several states indicates that it has always been assumed that the power existed to compel the giving of testimony or the production of books and papers by proper regulations prescribed by the legislative authority, and for a failure to give or produce such evidence, the law might authorize a presumption in a proper case against the party refusing, justifying the rend-

ering of a judgment by default, as if no answer had been filed. While it may be true that in some of the state statutes passed on the subject, and in decisions applying them, some confusion may appear to exist ,resulting from confounding the extent of the authority to punish as for a contempt and the right to engender a presumption relative to proof arising from a failure to give or produce evidence, it is accurate to say that when viewed comprehensively the statutes and decisions in effect recognize the difference between the two, and therefore may be substantially considered as but an exertion by the states of a like power to that which was conferred upon the courts of the United States by the original judiciary act and by Revised Statutes, section 724.

"Without referring in detail to the various statutes, which will be found collected as of the year 1896, in Vol. 6, Ency. Law and Practice, note 3, pp. 812, et seq., we content ourselves with saying that the laws of Indiana, Iowa, Mississippi, Massachusetts, *Missouri*, New Hampshire, Texas and Washington, aptly portray the subject. *As illustrative, we refer specially to the statute of Missouri*, which directs that when a party refuses to produce evidence or fails to attend to testify on a proper order, besides being punished as for a contempt, the court may strike out the answer filed on behalf of the defendant, etc. This distinction is also marked in the Indiana and Washington statutes. Although the State of Mississippi, which authorizes, in the event of a failure to obey a proper order as to the production of evidence, the striking of an answer from the files and the entry of judgment by default does not in terms refer the authority thus given to the legislative

power to engender a presumption, the true source of the power was clearly pointed out in the concurring opinion of Whitfield, J. (now Chief Justice of the Supreme Court of Mississippi), in *Illinois Central R. Co. v. Sanford,* 75 Mississippi, 862, and the distinction was made manifest between the power to create a presumption of fact and the want of authority as a mere punishment for contempt to deny a hearing, as ruled in Hovey v. Elliott. And the difference between the two is also elucidated in an opinion of the Supreme Court of the State of Washington in *Lawson v. Black Diamond Mining Co.,* 44 Wash. 26, which interpreted and enforced a statute of the State of Washington, embraced in section 6013, and immediately antecedent sections of Ballinger's Annotated Code and Statutes.

"As the power to strike an answer out and enter a default, conferred by section 9 of the act of 1905, which is before us, is clearly referable to the undoubted right of the lawmaking authority to create a presumption in respect to the want of foundation of an asserted defense against a defendant who suppresses or fails to produce evidence when legally called upon to give or produce, our opinion is that the contention that the section was repugnant to the Constitution of the United States is without foundation."

Again, in the case of *Consoldidated Rendering Co. v. Vermont,* 207 U. S. l. c. 550, Mr. Justice Peckham, while dealing with a question quite similar, said:

"We take the findings of fact by the state court as conclusive upon us. It therein appears that the company was duly served with a notice (which was

in substance a substitute for a subpoena *duces tecum*) to produce books and papers required, and that they had not been destroyed, but were then under its control and custody; that the papers were material evidence upon the subject of inquiry before the grand jury, and that the company had (with some minor exceptions) omitted and refused to produce them before that body. The company had a hearing before the court, and an opportunity was given it, under the statute, to set up any reasonable cause for its failure to comply with the requirements of the notice. The court, after this hearing, found the company guilty of the contempt charged, and fined it accordingly.

The company insists that the proceedings were in violation of the Constitution of the United States. The objections made before us were: (1) That the notice to produce was in excess of the authority granted by the statute, and was therefore invalid; (2) that neither the statute nor the notice afforded the company an opportunity to present in court reasons why the writings demanded should not be produced; (3) that the effect of the statute is to limit a corporation in the complete dominion and control of its property situated in another state, although the corporation is not organized under the laws of the state of Vermont, and is not personally within her jurisdiction; (4) that the statute attempts to confer judicial functions upon nonjudicial bodies, in violation of the Fourteenth Amendment to the Constitution of the United States; (5) that the statute and notice required the company to produce writings which tend to incriminate it, without extending immunity against criminal prosecution;

(6) that the statute and notice authorized an unreasonable search and seizure of the private books and documents of the company; (7) that the statute provided no compensation for the time, trouble and expense imposed upon a corporation in a foreign state or country of collecting and sending the documents demanded to the state of Vermont, and, lastly, (8) that the statute is confined in its operation to corporations, thus making an arbitrary classification, by which the company is deprived of the equal protection of the law secured by the Fourteenth Amendment.

The first objection made by counsel for the company is not of a Federal nature. Whether the notice to produce was broader than the statute provided for is a question of the construction of the State statute, and of the notice, and the decision of the state court is final on that question.

Counsel insisted before us, in discussing the second objection, that the failure to give an opportunity to be heard why the books should not be produced, deprived it of due process of law guaranteed under the Fourteenth Amendment. Without discussing the question whether this matter comes within the meaning of due process of law, we may say that the objection to the statute is not borne out by its text. The company had under its provisions, and by the fourth section, full opportunity to show cause before the court why it did not produce the papers, and the Supreme Court of Vermont has held in this case that any objection to the production of the papers made before the grand jury would have raised the question before that body, which it would have been its duty to report to the court for its ac-

tion. Upon such question the company would have been entitled to be heard, and it was in fact heard before the court previous to any decision by the court regarding the right of the company to withhold the papers. So long as a hearing is given before any proceeding is concluded to enforce the production of the papers, due process of law is afforded. *Simon v. Craft*, 182 U. S. 427; *Wilson v. Standefer*, 184 U. S. 399, 415; *New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 336, 349.

The third objection is without force. It is argued that the statute in this particular denies the process of law to the company, because it authorized the infliction of a fine by the court for failure to perform an act outside the State, ordered by a non-judicial body, and without notice and opportunity for hearing. The last reason has already been answered by showing that a hearing is provided for before any punishment of the company for disobedience to the requirements of the notice to produce can be enforced. There can surely be no illegality in providing that a corporation doing business in the State and protected by its power, may be compelled to produce before a tribunal of the State material evidence in the shape of books or papers kept by it in the State, and which are in its custody and control, although for the moment outside the borders of the State. The statute is in no sense a provision as to how the company shall perform its duties and obligations in other states. It directs the company doing business in the State and present therein, by its officers, or some of them, to do something which it is entirely competent to do, the purpose of which is to aid the tribunal in making the investigation under a state statute to perform its duty.

Fourth. There is no provision in the Federal Constitution which directly or impliedly prohibits a state, under its own laws, from conferring upon nonjudicial bodies certain functions that may be called judicial. It is said that the statute, in providing for the production of books and papers, includes not only the court and grand jury, but any tribunal or commission authorized by the State. There is nothing, as we have said, in the Federal Constitution which prevents it.

The fifth objection is also without merit, even upon the assumption that in such a case as this the company could take the objection through the witness. The court simply held that it would not determine whether the objection as to incrimination was valid until the books were produced for inspection by the court, though before they were to be used in evidence. If, after that inspection, any portion were found of that character, the court held that such portion would be excluded. As, however, the company failed and refused absolutely to produce any of the books, with some unimportant exceptions, it was adjudged to have failed to show any reasonable cause for such refusal to comply with the requirements of the notice, and it was fined for the contempt. Obviously the company could not by its refusal to produce the books thereby entirely conclude the court from any examination whatever into the sufficiency of the excuses for such nonproduction. Otherwise the company could disobey at its pleasure and so prevent any inquiry into the merits of the excuses. The statute might as well not exist if this were to be permitted.

Sixth. The objection that the notice authorized

by the statute amounted to an unreasonable search and seizure of the private books and documents of the company, is also not well founded. In *Adams v. New York*, 192 U. S. 585, where the question was raised, the court refused to discuss the contention that the Fourteenth Amendment made the provisions of the Fourth and Fifth Amendments to the Constitution of the United States, so far as they related to the right of the people to be secure against unreasonable searches and seizures, and to be protected against being compelled to testify in a criminal case against themselves, privileges and immunities of citizens of the United States, of which they could not be deprived by the action of the State, because on an examination of the record the court concluded that there had been no violation of this restriction, either in the unreasonable search and seizure or in compelling plaintiff in error to testify against himself. We are of opinion that there was no violation of such rights in the case before us, and we think it equally unnecessary to decide the question which was left undecided in the Adams case.

The objection is also made that the documents were not described with the particularity required in the description of documents necessary to a search warrant or subpoena, and that it was not a valid paper and created no obligation to obey the notice, which could form no justification for any proceeding for contempt, and was not due process of law. An examination of the notice to produce shows that the requirements of the notice, while quite broad, yet were limited to such books or papers as related to, or concerned, any dealings or business between January 1, 1904, and the date of the notice, October,

1906, with the parties named therein, who were cattle commissioners of the State of Vermont, and which papers were to be used relative to the matter of complaint pending, and then and there to be investigated by the grand jury, in which the persons named in the notice were charged with having unlawfully sold diseased meat for food purposes at Burlington. The notice also gave in detail the dates and amounts of checks and vouchers which the company was required to produce. The company refused to produce the book (with the exceptions stated), and even if the notice had been too broad, the objection cannot be urged as to the validity of the order adjudging the company guilty of contempt. *Hale v. Henkel*, 201 U. S. 43. But unless it can be said that the court or grand jury never has any right to call for all the books and papers, or correspondence, between certain dates and certain persons named, in regard to a complaint which is pending before such court or grand jury, we think the objection here made is not well founded. We see no reason why all such books, papers and correspondence which related to the subject of inquiry, and were described with reasonable detail, should not be called for and the company directed to produce them. Otherwise the State would be compelled to designate each particular paper which it desired, which presupposes an accurate knowledge of such papers, which the tribunal desiring the papers would probably rarely, if ever, have. The notice is not nearly so sweeping in its reach as in the case of *Hale v. Henkel, supra.*

Seventh. The next objection relates to the claim that the statute provides no compensation for the time, trouble and expense imposed upon a corpora-

tion in a foreign state or country in collecting and sending the documents demanded to the State of Vermont, and that it thereby takes, if enforced, private property for public use without compensation. The prohibition to that effect is found in the Fifth Amendment to the Federal Constitution. Here again we meet the question whether that amendment, because of the subsequent adoption of the Fourteenth Amendment, applies to a state proceeding, but for the reasons already stated, we do not find it expedient to discuss it here. We do not say that in any event a witness is entitled to compensation in order to avoid the above constitutional provision, but the Supreme Court in this case has held that the general law of the state, in reference to the compensation of witnesses, applied to this statute. The answer which the counsel for the company makes is that neither the statute nor the notice required the attendance of any one as a witness, but was merely an order for production for which no compensation was provided, either by the statute or under the general law. But the papers cannot walk into court of themselves, and when they are brought there by virtue of the notice to produce served on the company, and they are given to some person by the company for the purpose of such production, he has a right to be sworn as to the papers which he produces for the purposes of identification, if nothing else, and the state court has held that he is entitled as a witness to compensation.

Lastly, the objection is urged that there is an arbitrary classification in the statute, which is confined to corporations alone, and the company is thereby deprived of the equal protection of the laws secured by the Fourteenth Amendment. There is

no improper classification in this regard. It is stated by the state court that prior to the passage of this act there was no adequate provision for compelling the production of books and papers by a corporation, and it was held that the statute was designed for requiring the corporation itself, as the responsible owner and custodian, to produce the documentary evidence mentioned therein, without the necessity of calling upon bookkeepers, managers, or other servants who may, or may not, in fact, have custody and control thereof at the time notice to produce is given, and to place upon the corporation the responsibility of seeing that such evidence called for, if in its control, is produced. There is ample justification for the classification made by the statute."

The case of *Hale v. Henkel,* 201 U. S. 43, is also a direct authority against the contention of plaintiffs in error. In that case Mr. Justice Brown declared:

"The second branch of the case relates to the nonproduction by the witness of the books and papers called for by the subpoeno *duces tecum.*

Having already held that by reason of the immunity act of 1903, the witness could not avail himself of the Fifth Amendment, it follows that he cannot set up that amendment as against the production of the books and papers, since in respect to these he would also be protected by the immunity act. We think it quite clear that the search and seizure clause of the Fourth Amendment was not intended to interfere with the power of courts to compel, through a subpoena *duces tecum,* the production, upon a trial in court, of documentary evi-

dence. As remarked in *Summers v. Moseley*, 2 Cr. & M. 477, it would be "utterly impossible to carry on the administration of justice" without this writ. The following authorities are conclusive upon this question: *Amey v. Long*, 9 East, 473; *Bull v. Loveland*, 10 Pick. 9; *U. S. Express Co. v. Henderson*, 69 Iowa, 40; *Greenleaf on Evidence*, 469a.

If, whenever an officer or employe of a corporation were summoned before a grand jury as a witness he could refuse to produce the books and documents of such corporation, upon the ground that they would incriminate the corporation itself, it would result in the failure of a large number of cases where the illegal combination was determinable only upon the examination of such papers. Conceding that the witness was an officer of the corporation under investigation, and that he was entitled to assert the rights of the corporation with respect to the production of its books and papers, we are of the opinion that there is a clear distinction in this particular between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the State. The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the State or to his neighbors to divulge his business, or to open his doors to an investigation, so far as it may tend to criminate him. He owes no such duty to the State, since he received nothing therefrom, beyond the protection of his life and property. His rights are such as existed by the law of the land long antecedent to the organization of the State, and can only be taken from him by due process of law,

and in accordance with the Constitution. Among his rights are a refusal to incriminate himself, and the immunity of himself and his property from arrest or seizure, except under a warrant of the law. He owes nothing to the public so long as he does not trespass upon their rights.

Upon the other hand, the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it as long as it obeys the laws of its creation. There is a reserved right in the Legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose. The defense amounts to this: That an officer of a corporation, which is charged with a criminal violation of the statute, may plead the criminality of such corporation as a refusal to produce its books. To state this proposition is to answer it. While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges.

IV.

THE CONSTRUCTION PLACED BY THE SUPREME COURT OF MISSOURI UPON THE EXTENT OF ITS JURISDICTION AND ITS STATUTORY AND CONSTITUTIONAL AUTHORITY TO BOTH DECREE A FORFEITURE OF THE FRANCHISES OF PLAINTIFFS IN ERROR AND IMPOSE A FINE, DOES NOT CONTRAVENE ANY PROVISION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The basis of plaintiff's contention in this respect is that, since the right of the Supreme Court to impose a fine is but incidental to its *quo warranto* jurisdiction and its power to oust, and since such jurisdiction cannot be exercised in cases of individuals, it operates to deny corporations the equal protection of the law and to take its property without due process of law.

There is no lack of harmony among the decisions of this court as to the fallacy of plaintiff's contention.

In discussing the anti-trust statutes of Arkansas, this court, in *Hammond Packing Company v. Arkansas*, 212 U. S. l. c. 343, said:

> "Although it be conceded that the provisions of the statute cannot consistently, with constitutional limitations, be applied to individuals, such concession would not cause the act to amount to a denial of the equal protection of the laws. The difference between the extent of the power which the State may exert over the doing of business within the State by an individual and that which it can exercise as to corporations, furnishes a distinction authorizing a classification between the two. It is

apparent that the court below, both in the Hartford case and in this, by a construction which is here binding, treated the statute, in so far as its prohibitions were addressed to individuals, as separable from its requirements as to corporations, and, therefore, even though there was a want of constitutional power to include individuals within the prohibitions of the act, that fact does not affect the validity of the law as to corporations."

Again, in the recent case of *Standard Oil Co. v. Tennessee*, 217 U. S. 1. c. 420, Mr. Justice Holmes declared:

"The basis of the former contention is that by section 3 of the act any violation of it is made a crime, punishable by fine, imprisonment, or both, and that this section has been construed as applicable only to natural persons. *Standard Oil Co. v. The State*, 117 Tenn. 618. Hence, it is said, this statute denies to corporations the equal protection of the laws. For although it is addressed generally to the prevention of a certain kind of conduct, whether on the part of corporations or unincorporated men, the latter cannot be tried without a preliminary investigation by a grand jury, an indictment or presentment, a trial by jury, the right to an acquittal unless their guilt is established beyond a reasonable doubt, and the benefit of a statute of limitations of one year. Corporations, on the other hand, are proceeded against by bill in equity on relation of the Attorney-General without any of these advantages, except perhaps the right to a jury. Complaint is not made of the difference between fine or imprisonment and ouster, but it is insisted that this is a general criminal statute, that ouster is

a punishment as much as a fine, and that it is not a condition attached to the doing of business by foreign corporations, *Carroll v. Greenwich Ins. Co.*, 199 U. S. 401, 409, or indeed a regulation of the conduct of corporations as such at all. Therefore, the plaintiff in error complains that it is given a wrongful immunity from the procedure of the criminal law. This suit is for the same transaction for which, in the earlier case cited above, an agent of the company was indicted and fined.

The foregoing argument is one of the many attempts to construe the Fourteenth Amendment as introducing a factitious equality without regard to practical differences that are best met by corresponding differences of treatment. The law of Tennessee sees fit to prevent a certain kind of conduct. To prevent it the threat of fine and imprisonment is likely to be efficient for men, while the latter is impossible and the former less serious to corporations. On the other hand, the threat of extinction or ouster is not monstrous, and yet is likely to achieve the result with corporations, while it would be extravagant as applied to men. Hence, this difference is admitted to be justifiable. But the admission goes far to destroy the argument that is made. For if a fundamental distinction may be made in the evils that different delinquents are forced to suffer, surely the less important and ancient distinction between the modes of establishing the delinquency, according to the nature of the evil inflicted, even more easily may be justified. The Supreme Court of the State says that the present proceeding is of a civil nature, but assuming that nevertheless it ends in punishment, there is nothing novel or unusual about it. We are of opinion that subjection to it,

> with its concomitant advantages and disadvantages, is not an inequality of which plaintiff in error can complain, although natural persons are given the benefit of the rules to which we have referred before incurring the possible sentence to prison, which the plaintiff in error escapes."

The contention that this procedure and its penalties deprived plaintiffs in error of their property without due process of law, is again answered in *Twining v. New Jersey*, 211 U. S. 1. c. 111:

> "Among the most notable of these decisions are those sustaining the denial of jury trial both in civil and criminal cases, the substitution of informations for indictments by a grand jury, the enactment that the possession of policy slips raises a presumption of illegality, and the admission of the deposition of an absent witness in a criminal case. The cases proceed upon the theory that, given a court of justice which has jurisdiction and acts, not arbitrarily but in conformity with a general law, upon evidence, and after inquiry made with notice to the parties affected and opportunity to be heard, then all the requirements of due process, so far as it relates to procedure in court and methods of trial and character and effect of evidence, are complied with. Thus, it was said in *Iowa Central v. Iowa*, 160 U. S. 393: 'But it is clear that the fourteenth amendment in no way undertakes to control the power of the State to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted gives reasonable notice and affords fair opportunity to be heard before the issues are decided;' and in *Louisville & Nashville Railroad*

Company v. Schmidt, 177 U. S. 230, 236: 'It is no longer open to contention that the due process clause of the fourteenth amendment to the Constitution of the United States does not control mere forms of procedure in state courts or regulate practice therein. All its requirements are complied with, provided in the proceedings which are claimed not to have been due process of law the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend;' and in *Hooker v. Los Angeles,* 188 U. S. 314, 318: 'The fourteenth amendment does not control the power of a State to determine the form of procedure by which legal rights may be ascertained, if the method adopted gives reasonable notice and affords a fair opportunity to be heard;' and in *Rogers v. Peck,* 199 U. S. 435: 'Due process of law, guaranteed by the fourteenth amendment, does not require the State to adopt a particular form of procedure, so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution.''

In case of violation of the anti trust laws by corporations, the statute and Constitution of Missouri authorize the Attorney-General to proceed by information in quo warranto, and the Constitution of that State lodges jurisdiction in such cases with the Supreme Court. Thus, in these proceedings we find a court of justice vested with complete jurisdiction over the subject-matter and the person, a form of procedure which gives the accused sufficient notice and an adequate opportunity to be heard, and a court that acts upon proper evidence and in conformity with a general law, applicable alike to all within a legitimate class. This satisfies all the re-

quirements of "due process" and affords all within a class the "equal protection of the laws."

Other cases demonstrating that plaintiff in error was not discriminated against by being put upon trial under an information in quo warranto according to the practice of the Supreme Court, are as follows:

Magoun v. Illinois Trust Co., 179 U. S. 283.

Orient Insurance Co. v. Daggs, 172 U. S. 557.

Hager v. Missouri, 120 U. S. 68.

Maxwell v. Dow, 176 U. S. 599.

The principles upon which the Supreme Court of Missouri disposed of this assignment are sound and in consonance with the doctrine announced by this court. At page 368 (Record pp. 376-377), of the opinion, the Supreme Court of Missouri, says:

> "Their position is that those sections are in violation of the first section of the fourteenth amendment to the Constitution of the United States, in that while they denounce the same acts, whether committed by individuals or individuals and corporations, they impose upon the latter a greater and different punishment from that imposed upon individuals.
>
> In one sense that may be true, but it is not true in a legal sense.
>
> A corporation is a legal fiction—a creature of the law. It accepts its charter and corporate franchises with a tacit agreement or understanding that it will exercise the powers granted to it by the State, and none other; and that if it misuses those powers, or usurps powers not so granted, it will surrender or forfeit its charter, with all corporate franchises.

That the State has the power to enforce this agreement, or law of forfeiture, is not questioned by respondents, but they insist that it is a different and greater punishment than is imposed upon an individual for the commission of the same offense. In answer to that, it may be said that an individual is a natural person, created by his Maker, and not by law, and, therefore, has no franchises to exercise or to forfeit, consequently the same punishment, if you so term it, could not, in the very nature of things, be measured out to the individual which should be measured unto a corporation.

While it is true, to forfeit the charter of a corporation for usurpation of power is equivalent to taking its life, as it were; but we suppose it will not be seriously argued that, because the statute does not demand the life of the individual, as it does that of the corporation, as a punishment for his violation of the law, the law should and must be declared unconstitutional and void upon that ground. And, upon the other hand, where a statute denounces certain acts, whether committed by individuals or corporations, or both, it should not be declared unconstitutional because it provides for imprisonment of the former and a fine, or forfeiture of the latter's charter, as punishments for their violation of the statute. But if the contention of counsel for respondents is sound, then any individual could form an unlawful combination in restraint of trade with any corporation, and when proceeded against for such unlawful conduct either one or both of them could interpose the unconstitutionality of the statute, because the punishment prescribed against each is not the same but different. And we might add that,

if their position is tenable, then the Legislature would be powerless to provide for the imprisonment of the one because it could not imprison the other; nor could it provide for the forfeiture of the charter of the corporation, because the individual would have none to forfeit, *ergo* there is no punishment the Legislature could provide, excepting a fine against each. Such a contention regarding the proposition here involved if followed to its logical conclusion would lead to an absurdity, and, at the same time, shows the unsoundness of respondents' contention.

Nor do said sections of the statute deny respondents' equal protection of the law within the meaning of the fourteenth amendment of the Federal Constitution.

It is not the object or purpose of that provision of the Constitution to prevent legislation which embraces within its provisions all persons or things which naturally and reasonably belong to the same class and similarly situated and where the statute must operate equally and uniformly upon all such persons or things of that class. (*Andrus v. Ins. Assn.*, 168 Mo. 151; *Waters-Pierce Oil Co. v. State of Texas*, 19 *Tex. Civ. App.* 14; *Railroad v. Mackey*, 127 U. S. 209; *Barbier v. Connolly*, 113 U. S. 31; *Railroad v. Mathews*, 165 U. S. 25; *Plessy v. Ferguson*, 163 U. S. 550; *Railroad v. Ellis*, 165 U. S. 150.)

The purpose of that provision was to prevent legislation which embraces within its provisions persons or things which affect only a portion of the persons or things which rationally belong to the same class and who are similarly situated. (*Railroad v. Ellis*, 165 U. S. 150.)"

V.

THE CONSTRUCTION PLACED UPON THE ANTI-TRUST LAWS OF MISSOURI THAT THEY ARE APPLICABLE TO COMMODITIES, ARTICLES AND PRODUCTS AND INAPPLICABLE TO LABOR, DOES NOT RENDER THEM OBNOXIOUS TO THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The Supreme Court of Missouri construed the anti trust laws under review to be applicable to all commodities, articles and products of whatever nature, but not to include labor, and held that this classification was warranted.

Plaintiffs in error contend that this interpretation renders the law offensive to the fourteenth amendment in that it creates an artificial and unreasonable classification and amounts to an invidious discrimination against persons really belonging to the same class.

A.

THE DECISIONS OF THE SUPREME COURT OF MISSOURI, THAT THE REASONS FOR THE CLASSIFICATION AND THE PARTICULAR MISCHIEFS WHICH THE LEGISLATURE SOUGHT TO SUPPRESS, WERE SUFFICIENT TO WARRANT THE CLASSIFICATION, WILL NOT BE DISTURBED UNLESS SHOWN TO BE UNMISTAKABLY AND PALPABLY WRONG.

Concerning this classification, the Supreme Court of Missouri, says: (Record pp. 377-378.)

> "Nor do we agree with respondents in their contention that those statutes are violative of that

constitutional provision, in that they unjustly discriminate against property by embracing commodities only and not including labor, which, it is contended, may also become the subject of a pool or combination.

While it is true those statutes are limited in their scope and operation to persons and corporations dealing in commodities, and do not include combinations of persons engaged in labor pursuits, yet it must be bore in mind that the differentiation between labor and property is so great that they do not belong to the same general or natural classification of rights, or things, and have never been so recognized by the common law, or by legislative enactments. They stand upon entirely different footings and the laws pertaining to the one are entirely different from those pertaining to the other.

Labor has always been considered in the nature of an attribute to man, and partakes more or less of his individuality, and personal liberty, and is inseparable from his person. Labor and labor organizations are controlled and protected by laws enacted to operate largely upon the individuals personally, and not so much as upon the product of their labor, called commodities, while, upon the other hand, commodities are nothing but property, and have no personal connection with the owner whatever.

Legislation affecting property and property rights will in no manner interfere with the personnel of the owner. But that is not true of laws regarding labor, for the reason that the moment you enact laws affecting labor, that moment and by that law you affect the personnel of the laborer. I am not speaking of those laws which are enacted to secure

the wages due for labor, but I am referring to the laws that are applicable to labor itself; such as those guaranteeing to the person the right to labor, the right to contract to labor and the right to agree upon prices to be paid therefor, as well as those which prevent involuntary servitude, etc.

This classification of the laws regarding labor and property have always been recognized, by all nations, in all ages; and those laws which apply to the one have never been considered or looked upon as being special and class-legislation, because they do not embrace both.

Mr. Blackstone, in his masterly treatise upon the common law, starts out by classifying the laws into the rights of persons and the rights of things, and then he treats the laws applicable to each class separately. Our laws are in this day based upon that same classification, and this is the first time I have ever heard it contended that the laws enacted for the one class must embrace the other, otherwise the act would be unconstitutional and void.

Respondents have cited no authority sustaining their contention, and we assume there is none.

In the very nature of things a law could not be enacted which would be equally applicable to persons and things without interfering with the personnel and liberty of the laborer.

The Legislature in enacting these anti trust laws well knew of this natural classification of commodities and labor, and enacted laws only embracing the former, which in no manner deprives their owners of any of their legal or personal rights, while if they had also embraced labor combinations, they would have entrenched upon the personal rights of the laborer.

> While the Legislature might have included labor combinations, yet it did not do so, and the reason, above stated, alone was a sufficient justification for the omission to include labor combinations in the act; to say nothing regarding the general and natural classification of persons and things, which have always been recognized by the law-making powers.
>
> There is nothing new that can be said upon this subject which would throw any additional light upon it. The authorities above cited are but a few of the many which support the conclusions above stated.
>
> These sections of our statutes embrace all persons and corporations who naturally belong to the same class, and they do not arbitrarily and capriciously, without reason, divide classes or distinguish between classes existing under similar conditions."

The principle of classification is well established, its recognition and application being indispensably essential to the solution of governmental problems which come from persons in an infinite variety of relations. In solving these problems local conditions and the particular circumstances prevailing in the State where the law is to be operative, become important factors.

In dealing with these conditions and the adaptability of laws to accomplish certain desired ends, the Legislature and the State courts are peculiarly situated, they being familiar with such matters, while from the very nature and necessity of the case a like familiarity cannot be ascribed to this court.

For these reasons the judgment of the highest State court will be adhered to, unless the error thereof clearly appears.

In *Welch v. Swasey*, 214 U. S. 1. c. 105, this court, in discussing the question here presented, said:

"There is here a discrimination or classification between sections of the city, one of which, the business or commercial part, has a limitation of one hundred and twenty-five feet, and the other used for residental purposes, has a permitted height of buildings from eighty to one hundred feet." * * * *

"In passing upon questions of this character as to the validity and reasonableness of a discrimination or classification in relation to limitations as to height of buildings in a large city, the matter of locality assuming an important aspect. The particular circumstances prevailing at the place or in the State where the law is to become operative; whether the statute is really adapted, regard being had to all the different and material facts to bring about the results desired from its passage, whether it is well calculated to promote the general and public welfare, are all matters which the State court is familiar with, but a like familiarity cannot be ascribed to this court, assuming judicial notice may be taken of what is or ought to be generally known. For such reason this court, in cases of this kind, feels the greatest reluctance in interfering with the well considered judgments of the courts of a State whose people are to be affected by the operation of the law. The highest court of the State in which statutes of the kind under consideration are passed is more familiar with the particular causes which led to their passage (although they may be of a public nature), and with the general situation surrounding the subject matter of the legislation than this court can possibly be."

* * * * *

"In this case the Supreme Judicial Court of the State holds the legislation valid, and that there

is a fair reason for the discrimination between the heights of buildings in the residential as compared with the commercial districts. That court has also held that regulations in regard to the height of buildings, and in regard to their mode of construction in cities, made by legislative enactments for the safety, comfort or convenience of the people and for the benefit of property owners generally are valid. *Attorney-General v. Williams*, 174 Massachusetts, 476."

"These are matters which it must be presumed were known by the Legislature, and whether or not such were the facts was a question, among others, for the Legislature to determine."

Again, in *Southwestern Oil Co. v. Texas*, 217 U. S. 126, 127, the court reaffirms and, in fact amplifies this doctrine:

"What were the special reasons or motives inducing the State to adopt the classification of which the oil company complains, we do not certainly know, nor is it important that we should certainly know. It may be that the main purpose of the State was to encourage retail dealing in the particular articles mentioned in section 9. If the statute had its origin in such a view, we do not perceive that this court can deny the power of the State to proceed on that ground. We may repeat what was said in *Delaware Railroad Tax Cases*, 18 Wall. 206, 231; that 'it is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the Legislature of the State; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction.' But we will not speculate as to the motives of the State, and will assume—the statute,

either upon its face or by its necessary operation, not suggesting a contrary assumption—that the State has in good faith sought, by its legislation, to protect or promote the interests of its people. It is sufficient for the disposition of this case to say that, except as restrained by its own Constitution or by the Constitution of the United States, the state of Texas, by its legislature, has full power to prescribe any system of taxation which, in its judgment, is best or necessary for its people and government; that, so far as the power of the United States is concerned, the State has the right by any rule it deems proper, to classify persons or businesses for the purposes of taxation, subject to the condition that such classification shall not be in violation of the Constitution of the United States; that the requirement by the State, that *all* wholesale dealers in *specified articles* shall pay a tax of a given amount on their occupation, without exacting a similar tax on the occupations of wholesale dealers in *other* articles, cannot, on the face of the statute or by reason of any fact within the judicial knowledge of the court, be held, within the meaning of the fourteenth amendment, to deprive the tax payer of his property without due process of law, or to deny him the equal protection of the laws; and that the Federal court cannot interfere with the enforcement of the statute simply because it may disapprove its terms, or question the wisdom of its enactment, *or because it cannot be sure as to the precise reasons inducing the State to enact it.*"

In *McLean v. Arkansas*, 211 U. S. l. c. 547, the court again says:

"The legislature being familiar with local con-

ditions is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power. *Jacobson v. Massachusetts*, 197 U. S. 11; *Mugler v. Kans.*, 123 U. S. 623; *Minnesota v. Barber*, 136 U. S. 313, 320; *Atkins v. Kansas*, 191 U. S. 207, 223." * * * * *

"We cannot say there was no reason for exempting from its provisions mines so small as to be in the experimental or formative state and affecting but few men, and not requiring regulation in the interest of the public health, safety or welfare. We cannot hold, therefore, that this law is so palpably in violation of the constitutional rights involved as to require us, in the exercise of the right of judicial review, to reverse the judgment of the Supreme Court of Arkansas, which has affirmed its validity."

In *Williams v. Arkansas*, 217 U. S. l. c. 90, it is said:

"When a state legislature has declared in its opinion, policy requires a certain measure, its action should not be disturbed by the court under the fourteenth amendment, unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched.' *Missouri, Kansas & Texas Ry. Co. v. May*, 194 U. S. 267."

B.

THE DISTINCTION BETWEEN LABOR AND PROPERTY IS BROAD ENOUGH TO AUTHORIZE CLASSIFICATION AND SEPARATE REGULATIONS.

The equality of operation which the Constitution requires in state legislation cannot be construed as demanding an absolute universality of operation, having no regard to the different capabilities, conditions and relations of men. Classification necessarily involves inequality between members of *different* classes, but if it results in equality between the members of the same class, such equality satisfies the constitutional requirement.

As said in *Atchison & Topeka Ry. v. Matthews*, 174 U. S. 96:

> "Indeed, the very idea of classification is that of inequality, so it goes without saying that the fact of inequality in no manner determines the matter of constitutionality."

What may be regarded as a class for the purpose of separate regulations is a question not always easily determined, but labor and property are so obviously different, and so thoroughly incapable of the same regulations, that the question here involved should present but little difficulty. Laws regulating the hours of labor and the protection and employment of certain classes of laborers are quite frequent, and are universally sustained, although they apply to none other.

That labor is a class within itself and clearly distinguishable from commodities, is manifested from the fact that Con-

gress, State Legislatures and the courts now uniformly recognize the right of laboring people to organize for the purpose of fixing, advancing and maintaining their wages, and determining their hours of labor.

Eliminating certain earlier English cases, it is now well settled in this country and England that a person has the right to work for and with whom he pleases and to secure employment not only for himself, but for others, and that what he may legally do alone in this respect he may combine with any number of others to do.

Congress has expressly recognized this right by enacting a law, applicable solely to labor organizations, which makes provision for the incorporation and operation of associations of working people to regulate their wages and their hours and condition of labor.

United States Comp. Stat. (1901) p. 3204.

Almost every state in the Union has laws of a similar nature, and in no case have such laws been held invalid upon the ground that they do not include associations of those dealing in commodities, but apply alone to labor.

Independent, however, of such statutory provisions, the courts have uniformly recognized this inherent right.

In dealing with a subject very much like that now under consideration, Judge Taft, in the case of *Thomas v. Cincinnati N. O. & T. P. Rd. Co.* (C. C.) 62 Fed. 803, said:

> "That the employes of the railroad had the right to organize into or join a labor union which should take joint action as to their terms of employment. It is of benefit to them and to the public that laborers should unite in their common interest and for lawful purposes. They have labor to sell. If they stand together, they are often able, all of them, to command better prices for their labor

than when dealing singly with rich employers, because the necessities of the single employe may compel him to accept any terms offered him. * * * They have the right to appoint officers who shall advise them as to the course to be taken by them in their relations with their employer. They may unite with other unions. The officers they appoint, or any other person to whom they choose to listen, may advise them as to the proper course to be taken by them in regard to their employment, or, if they choose to repose such authority in any one, he may order them, on pain of expulsion from their union, peaceably to leave the employ of their employer because any of the terms of their employment are unsatisfactory."

In the case of *Arthur v. Oakes*, 11 C. C. A. 209, 63 Fed. 310, Mr. Justice Harlan expressed the rule thus:

> "It is the right of the employes, without reference to the effect upon the property or upon the operation of the road, to confer with each other upon the subject of the proposed reduction in wages, and to withdraw in a body from the services of the receivers, because of the proposed change. * * * If in good faith and peacefully they exercise that right of quitting the service, intending thereby only to better their condition by securing such wages as they deem just, but not to injure or interfere with the free action of others, they cannot be legally charged with any loss to the trust property resulting from their cessation of work in consequence of the refusal of the receivers to accede to the terms upon which they are willing to remain in the service."

In the case of *Hopkins v. U. S.*, 171 U. S. 578, it is held by the Supreme Court, in substance and effect, that the agreements which are condemned as in restraint of interstate commerce, do not include agreements not to work for less than a certain sum, or not to work except under certain conditions, even though the cost of interstate traffic would be thereby enhanced.

Again, in the case of *Wabash Rd. Co. v. Hannahan*, 121 Fed. l. c. 568, 569, Judge Adams said:

> "I might continue at length in the citation of cases stating or illustrating the foregoing proposition, but enough has been said to clearly indicate the general rule which may be briefly summarized as follows: An employe has an unquestionable right to place a price and impose conditions upon his labor at the outset of his employment, or, unless restrained by contract obligations, upon the continuance of his labor at any time thereafter; and, if the terms and conditions are not complied with by the employer, he has a clear right either not to engage or, having engaged, in his service, to cease from work. What one may do all may do.
>
> They may seek and obtain counsel and advice concerning their rights, duties and obligations in relation to their employer, and persons interested in their welfare may advise, aid and assist them in securing such terms and conditions of service as will best subserve their interests, and what they may lawfully do singly or together they may organize and combine to accomplish."
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> * * * * * * * * *
>
> "They may, by peaceful and lawful combination and concert of action, be able to so control the supply of labor as to compel the employer to come to their terms."

Among other cases emphasizing the soundness of the doctrine just announced, are the following:

Couer D'Alene Consolidated, etc. Co. v. Miners' Union, 51 Fed. 260.

In re Higgins, 27 Fed. 443.

State v. Stockford, 77 Conn. 227.

Snow v. Wheeler, 113 Mass. 179.

Beck v. Ry. Teamsters' Protective Union, 118 Mich. 497.

Gray v. Building Trades Council, 91 Minn. 171.

Mayer v. Journeymen Stonecutters' Ass'n. 47 N. J. Equity, 519.

Nat'l Protective Ass'n. v. Cumming, 170 N. Y. 315.

Moores v. Bricklayers' Union, 10 Ohio Dec. (Reprint) 665

Long Shore Ptg. Co. v. Powell, 26 Oreg. 527.

Cote v. Murphy, 159 Pa. St. 420.

Everett Waddey Co. v. Richmond Typographical Union, 53 S. E. 273.

Reg. v. Rowland, 5 Cox C. C. 436.

When it is considered that the United States has the Sherman anti-trust law and the various states have their anti-trust, common and statutory laws prohibiting the determination, regulation and maintenance of the prices of *commodities*, the cases heretofore cited, sustaining the right of laborers to combine for the purpose of fixing, regulating and maintaining the prices and wages of *labor*, demonstrate that the distinction between labor and commodities is so great as to admit of separate, distinct and even directly opposite regulations.

It is true that the Federal courts have held the Sherman anti-trust law applicable when labor unions resort to force, intimidation, threats and "boycott," but no such question as that is involved here and was neither presented to nor passed upon by the State court. In such a case the State court could, under its present system of laws, grant relief.

United States v. Debs, 158 U. S. 564.

These decisions of the Federal courts, holding the Sherman act applicable to labor organizations under certain circumstances give not the slightest intimation that the act would be invalid if the language used were so limited as not to be susceptible of the construction that it is applicable to labor in the cases mentioned. On the contrary, the discussion of the meaning and application of the act, and the process of reasoning applied in arriving at the conclusion that the same is applicable under such conditions, are based upon the postulate that such laws do not necessarily have to include labor.

United States v. Debs, 64 Fed. l. c. 724-755. Affirmed, 158 U. S. 564.

U. S. v. Workingmen's Amalgamated Council, 54 Fed. 994.

Loewe v. Lawlor, 208 U. S. 274.

The classification here complained of is based upon reasonable grounds and upon obvious differences in existing conditions. The statute applies alike to all persons who deal in articles, products and commodities. No discrimination is shown in favor of one as against another. It does not select particular individuals from a class or locality and subject them to peculiar rules or impose upon them certain obligations and burdens from which others in the same locality or

class are exempt. A few cases showing the large latitude allowed to the states for the purpose of classification, and sustaining the validity of the statute under review, will be considered.

In *Williams v. Arkansas*, 217 U. S. l. c. 79, it was held that a statute prohibiting drumming or soliciting business on trains for hotels and medical practitioners was not unconstitutional, because it relates to such classes alone, and does not prohibit drumming or soliciting for other purposes.

In *Pacific Express Company v. Seibert*, 142 U. S. 339, a state statute defining an express company to be such as carried on the business of transportation on contracts for hire, with *railroad* and *steamboat* companies, did not invidiously discriminate against the express companies defined by it by exempting other companies carrying express matter in vehicles of their own.

This court, in *McLean v. Arkansas*, 211 U. S. 545, sustained a statute which divided coal mines into those where less than ten are employed and those where more than that number are engaged, and held that such classification was warranted.

The recent decision of this court in case of *Southwestern Oil Co. v. Texas*, 217 U. S. 114 (l. c. 121), ably discusses this question and reviews a number of cases relating thereto.

In that case the court says:

> "But it is contended that the statute contravenes the Fourteenth Amendment, in that it denies to the Oil Company the equal protection of the laws. This position is based mainly on the ground that the statute by imposing a tax on *wholesale* dealers in coal oil, naphtha, benzine, mineral oils refined from petroleum, and all other mineral oils, while omitting to put any such tax whatever on wholesale

dealers in other articles of merchandise—such, for instance, as sugar, bacon, coal and iron—so discriminates against wholesale dealers in the several articles specified in section 9 as to deny them the equal protection of the laws. This view gives to the amendment a scope that could not have been contemplated at the time of its adoption. The tax in question is conceded to be an occupation tax simply. It was imposed under the authority of the State Constitution, providing that the Legislature may impose occupation taxes, both upon natural persons and occupations other than municipal, doing any business in the State, * * * except that persons engaged in mechanical and agricultural pursuits shall never be required to pay an occupation tax. It is not questioned that the State may classify occupations for purposes of taxation. In its discretion it may tax all, or it may tax one or some, taking care to accord to all *in the same class* equality of rights. The statute in respect of the particular class of wholesale dealers mentioned in it is to be referred to the governmental power of the State, in its discretion, to classify occupations for purposes of taxation. The State, keeping within the limits of its own fundamental law, can adopt any system of taxation or any classification that it deems best by it for the common good and the maintenance of its government, provided such classification be not in violation of the Fourteenth Amendment.

A leading case on the general subject is *Bell's Gap Rd. Co. v. Pennsylvania,* 134 U. S. 232, 237. In that case a question arose as to whether a statute of Pennsylvania, subjecting bonds and other securities issued by corporations, to a higher rate of taxation than was imposed on other moneyed securities,

was a denial of the equal protection of the laws to corporations. This court held that there was no discrimination which the State was not competent to make, saying: 'All corporate securities are subject to the same regulations. The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may imposes different specific taxes upon different trades and professions, and may vary the rate of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usages, are within the discretion of the State Legislature, or the people of the State in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject that would include all cases. They must be decided as they arise. We think that we are safe in saying that the Fourteenth Amendment was not intended to compel the State to adopt an iron

rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the States, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material; but it would render nugatory those discriminations which the best interests of society require, which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice; and which every State, in one form or another, deems it expedient to adopt.'

In *Home Ins. Co. v. New York*, 134 U. S. 594, involving the constitutional validity of a law taxing corporate franchises and business, the court held that the statute was not a denial of the equal protection of the laws. It said that the amendment 'does not prevent the classification of property for taxation—subjecting one kind of property to one rate of taxation, and another kind of property to a different rate—distinguishing between franchises, licenses and privileges, and visible and tangible property, and between real and personal property. Nor does the amendment prohibit special legislation. Indeed, the greater part of all legislation is special, either in the extent to which it operates, or the objects sought to be obtained by it. And when such legislation applies to artificial bodies, it is not open to objection if all such bodies are treated alike under similar circumstances and conditions, in respect to the privileges conferred upon them and the liabilities to which they are subjected. Under the statute of New York all corporations, joint stock companies and associations of

the same kind are subjected to the same tax. There is the same rule applicable to all under the same conditions in determining the rate of taxation. There is no discrimination in favor of one against another *of the same class.*'

So, in *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 562: 'A tax may be imposed only upon certain callings and trades, for when the State exerts its power to tax, it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. It would be an intolerable burden if a state could not tax any property or calling, unless, at the same time, it taxed all property or all callings. Its discretion in such matters is very great and should be exercised solely with reference to the general welfare involved in the necessity of taxation for the support of the state. A state may in its wisdom classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States, so long as the classification does not invade rights secured by the Constitution of the United States.'

There are many other cases in which the court considered the meaning and scope of the constitutional guaranty of the equal protection of the laws. We will refer to a few of them.

In *Kentucky Railroad Tax Cases*, 115 U. S. 321, 337, the court sustained, as not inconsistent with the equal protection clause of the Fourteenth Amendment, a Kentucky statute providing for the assessment of railroad property for purposes of taxation in a mode different from that prescribed as to ordinary real estate, or as to the property of cor-

porations chartered for other purposes, such as bridge, mining, street railway, manufacturing, gas and water companies. It said that 'the rule of equality, in respect to the subject, only requires the same means and methods to be applied impartially to all the constituents of *each class*, so that the law shall operate equally and uniformly upon all persons *in similar circumstances*. There is no objection, therefore, to the discrimination made as between railroad companies and other corporations in the method and instrumentalities by which the value of their property is ascertained.' In *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 294, which involved the constitutionality of an inheritance tax law, the court recognized the power of the state to 'distinguish, select and classify objects of legislation' by laws which did not violate the settled usages and established practices of our government. In *American Sugar Refining Company v. Louisiana*, 179 U. S. 89, a state enactment, imposing a license tax on the business of refining sugar and molasses, was held not to be a denial of the equal protection of the laws, because of the exemption from such tax of planters and farmers who ground and refined their own sugar and molasses. In *W. W. Cargill Company v. Minnesota*, 180 U. S. 452, a statute requiring a license to operate a warehouse for the receipt of grain, located upon the right of way of a railroad, but which did not require a license as to a similar warehouse not located on any right of way, was not a denial of the equal protection of the laws to the first-named class. In *Cook v. Marshall Co.*, 196 U. S. 268, which involves the validity of a cigarette tax law that made a distinction between

jobbers and wholesale dealers in cigarettes, the court said: 'There is a clear distinction in principle between persons engaged in selling cigarettes generally or at retail, and those engaged in selling by wholesale to customers without the state. They are two entirely distinct occupations. One sells at retail and the other at wholesale, one to the public generally and the other to a particular class; one within the state, the other without. From time out of mind it has been the custom of Congress to impose a special license tax upon wholesale dealers different from that imposed upon retail dealers. A like distinction is observed between brewers and rectifiers, wholesale and retail dealers in leaf tobacco and liquors, manufacturers of tobacco and manufacturers of cigars, as well as peddlers of tobacco. It may be difficult to distinguish these several classes in principle, but the power of Congress to make this discrimination has not, we believe, been questioned.' In *Armour Packing Co. v. Lacy*, 200 U. S. 226, a State law, imposing a license tax on meat packing houses, did not deny the equal protection of the laws to persons or corporations engaged in such business, because a like tax was not imposed on persons engaged in the business of selling the products of such houses, or on those engaged in packing articles of food other than meat.

In our judgment, the objection that within the true meaning of the Fourteenth Amendment the statute of Texas has the effect to deny to the oil company the equal protection of the laws does not rest upon any solid basis. The statute makes no distinction among such wholesale dealers as handle *the particular articles specified* in section 9. The

> state had the right to classify such dealers *separately* from those who sold, by wholesale, other articles than those mentioned in that section. The statute puts the constituents of *each of those separate classes* on the same plane of equality. It is not arbitrary legislation, except in the sense that all legislation is arbitrary. If it be within the power of the legislature to enact the statute, then arbitrariness cannot be predicated of it in a court of law. And it cannot be held to be beyond legislative power simply because of its classification of occupations." * * *
>
> So far as the power of the United States is concerned, the State has the right, by any rule it deems proper, to classify persons or businesses for the purposes of taxation, subject to the condition that such classification shall not be in violation of the Constitution of the United States; that the requirement by the state, that *all* wholesale dealers in *specified articles* shall pay a tax of a given amount on their occupation, without exacting a similar tax on the occupations of wholesale dealers in *other articles*, cannot, on the face of the statute or by reason of any facts within the judicial knowledge of the court be held, within the meaning of the Fourteenth amendment."

In *Brown-Forman Co. v. Ky.*, 217 U. S. 563, this court sustained the validity of a statute which placed an occupation tax upon all distillers who compounded, rectified or blended distilled spirits, but which exempted distillers and rectifiers of straight distilled liquors.

In that case it is said:

> "We come then to the question as to whether this act makes an arbitrary and illegal discrimi-

nation in favor of other persons or corporations engaged in the same business. The question is at last one of classification of subjects, trades or pursuits for the purpose of taxation, and concerns the power of the states to exercise discretion in the methods, subjects and rates of taxation. Fundamental to the very existence of the governmental power of the states as is this function of taxation, it is nevertheless subject to the beneficial restriction that it shall not be so exercised as to deny to any the equal protection of the law. But this restriction does not compel the adoption of 'an iron rule of equal taxation,' nor prevent variety in methods of taxation or discretion in the selection of subjects, or classification for purposes of taxation of either properties, businesses, trades, callings or occupations. This much has been over and over announced by this court. *Bell's Gap Railroad v. Pennsylvania*, 134 U. S. 232; *Cargill Co. v. Minnesota*, 180 U. S. 452; *Missouri, Kansas & Texas Railway Co. v. May*, 194 U. S. 267; *Cook v. Marshall County*, 196 U. S. 268; *Williams v. Arkansas*, 217 U. S. 79; *Southwestern Oil Co. v. State of Texas*, 217 U. S. 114." * *

"Plaintiff in error now says that it has been arbitrarily singled out and its business or occupation taxed, thereby discriminating in favor of 'three other classes engaged in the same business.'" * * *

"A very wide discretion must be conceded to the legislative power of the State in the classification of trades, callings, businesses or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricous nor arbitrary, and rests upon some reasonable con-

sideration of difference or policy, there is no denial of the equal protection of the law."

In *Armour Packing Company v. Lacy*, 200 U. S. 227, a statute of North Carolina imposing a license tax on meat packing houses and exempting persons engaged in packing articles of food other than meat, as well as persons not doing a meat packing business, but selling the products thereof, was declared valid. In that case the court says:

> "As we have frequently held, the State has the right to classify occupations and to impose different taxes upon different occupations. Such has been constantly the practice of Congress under the internal revenue laws. *Cook v. Marshall County*, 196 U. S. 261, 275. What the necessity is for such tax, and upon what occupations it shall be imposed, as well as the amount of the imposition, are exclusively within the control of the State Legislature. So long as there is no discrimination against citizens of other states, the amount and necessity of the tax are not open to criticism here. 197 U. S. 69.
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> This practically disposes of the fourth and fifth contentions, since the classification of meat packing houses cannot be said to be an arbitrary selection or not to rest on reasonable grounds, and the Fourteenth Amendment was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways, or through the undoubted power of classification to impose different taxes upon different trades and professions.
>
> 'A tax may be imposed only upon certain callings and trades, for when the state exerts its power to tax, it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. It would be an intolerable bur-

den if a state could not tax any property or calling unless, at the same time, it taxed all property or all callings.' *Connolly v. Union Sewer Pipe Company*, 184 U. S. 540, 562.

And see *Cargill Co. v. Minnesota*, 180 U. S. 452; *Kidd v. Alabama*, 188 U. S. 730; *Savannah, Thunderbolt, &c. Ry. Co. v. Savannah*, 198 U. S. 392; *Minnesota Iron Co. v. Kline*, 199 U. S. 593; *Cable v. United States Life Insurance Company*, 191 U. S. 288, 307.

By the act under consideration the tax is levied upon every packing house doing business in the state, which includes by its terms both domestic and foreign meat-packing houses. It is true that it appears that where the Armour Packing Company does business certain persons sell both by wholesale and retail packing-house products, and yet are not subjected to this tax, but also that those parties are not doing either in North Carolina or elsewhere a packing-house business. And so it appears that in North Carolina, at the points where the Armour Packing Company is engaged in business, and at other places in the state, there are establishments engaged in business, which pack articles of food other than meats, such as peas, beans, pumpkins, etc., and offer them for sale; but we cannot accept the suggestion that the statute is void as denying the equal protection of the laws to meat packing houses because houses packing vegetables and the like are not included in the same classification and subject to the same tax."

In *Clark v. Titusville*, 184 U. S. 330, the court held that ordinances imposing a license tax upon the merchants of the city by which they were divided into classes according to the

amount of their sales, each class including all whose sales ranged between a certain maximum and minimum amount, do not violate the equality clause of the United States Constitution, although the result is to make persons in *different classes pay different rates* and to make those in the *same class* pay at a *different* ratio, if the amount of their sales differ. If a city or state has the right to classify in that manner and for revenue purposes, as in that case, they certainly have the right to classify for police regulation or license tax purposes. If there is any difference in the principles of classification, with reference to matters of revenue and regulation or license tax, stricter uniformity is required in the matter of revenue.

In *Cook v. Marshall County,* 196 U. S. 261, it was held that the classification by statute in which a distinction is made between wholesale and retail dealers and imposing a tax on cigarette dealers is not invalid because it does not apply to jobbers and wholesalers doing a cigarette business with customers outside of the state.

In upholding that statute, the court said:

> "From time out of mind it has been the custom of Congress to impose a special license tax upon wholesale dealers different from that imposed upon retail dealers. A like distinction is observed between brewers and rectifiers, wholesale and retail dealers in leaf tobacco and liquors, manufacturers of tobacco and manufacturers of cigars, *as well as peddlers of tobacco.* It may be difficult to distinguish these several classes in principle, but the power of Congress to make this discrimination has not, we believe, been questioned.
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> Why the legislature should have made the distinction found in section 5007 is not entirely clear."
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> * * *

> "We are satisfied the section is not open to the objection of denying to the dealers in cigarettes the equal protection of the laws."

In *American Sugar Refining Co. v. La.*, 179 U. S. 89, this court held that a state statute imposing a license tax upon persons and corporations carrying on the business of refining sugar and molasses does not, by exempting from such tax all planters and farmers grinding and refining their own sugar and molasses, deny sugar refineries the equal protection of the laws within the meaning of the Fourteenth Amendment.

In that case it is said:

> "The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination, if founded upon a reasonable distinction in principle, is valid. Of course, if such discrimination were purely arbitrary, oppressive or capricious, and made to depend upon differences of color, race, nativity, religious opinions, political affiliations or other considerations having no possible connection with the duties of citizens as taxpayers, such exemption would be pure favoritism and a denial of the equal protection of the laws to the less favored classes. But from time out of mind it has been the policy of this government, not only to classify for purposes of taxation, but to exempt producers from the taxation of the methods employed by them to put their products upon the market."
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> * * *
>
> "Congress, too, has repeatedly acted upon the principle of the Louisiana statute. Thus, after having imposed by act of August 2, 1813, a license tax upon the retailers of wines and spirits, for the pur-

pose of providing for the expense of the war with Great Britain, it was further enacted by an act of February 8, 1815, c. 40, 3 Stat. 205, that it should not be construed 'to extend to vine dressers who sell at the place where the same is made, wine of their own growth, nor shall any vine dresser for vending solely where the same is made, wine of his own growth, be compelled to take out a license as a retailer of wines.' So, too, in the Internal Revenue Act of July 1, 1862, c. 119, 12 Stat. 432, a license tax was imposed (sec. 64) upon retail dealers in all goods, wares and merchandise, but with a proviso in section 66, that the act should not be construed 'to require a license for the sale of goods, wares and merchandise made or produced and sold by the manufacturer or producer at the manufactory or place where the same is made or produced; to vinters who sell, at the place where the same is made, wine of their own growth; nor to apothecaries, as to wines or spirituous liquors which they use exclusively in the preparation or making of medicines for lame, sick or diseased persons.' Another paragraph of the same section (64) exempts distillers who sell the products of their own stills from a tax as wholesale dealers in liquors. While no question of the power of Congress is involved, these instances show that its general policy does not differ from that of the act in question, and that the discrimination is based upon reasonable grounds.

So, too, this court has had repeated occasion to sustain discriminations founded upon reasons much more obscure than this."

In *W. W. Cargill Co. v. Minn.*, 180 U. S. 452, this court held that a state statute which applied only to warehouses

located *on* the right of way of a railroad was not invalid by reason of its non-application to warehouses *not* situated on such rights of way.

In holding this classification to be reasonable, and that it did not amount to a denial of the equal protection of the laws, the court said:

> "Thus considering the statute we are of opinion that the mere requirement of a license from a person, firm or corporation engaged in such business as that conducted by the defendant is not forbidden by the Fourteenth Amendment of the Constitution of the United States. 'The liberty mentioned in that Amendment,' we have said, 'means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.' *Allegeyer v. Lousiana*, 165 U. S. 578, 589. But to require the defendant company to obtain a license is not forbidden by the Amendment. The authority to make such a requirement is to be referred to the general power of the state to adopt such regulations as are appropriate to protect the people in the enjoyment of their relative rights and privileges, and to guard them against fraud and imposition. *Dent v. West Virginia*, 129 U. S. 114, 122; *Plumley v. Mas-*

sachusetts, 155 U. S. 461. The state court well said that the defendant's warehouse could be fairly regarded 'as a sort of public market where the farmers come with their grain for the purpose of selling the same, and where the purchaser, a party in interest, acts as marketmaster, weighmaster, inspector and grader of the grain.'

We cannot question the power of the state, so far as the Constitution of the United States is concerned, to require a license for the purpose of carrying on business of that character within its limits—such a license not being required for the purpose of forbidding a business lawful or harmless in itself, but only for purposes of regulation."

* * * * * * *

"If in the judgment of the state it was necessary for the public interests, or beneficial to the public, that elevators and warehouses of the kinds described should be operated only under a license and under such regulations as may be rightfully prescribed, it would be going very far to hold that such a classification was so unreasonable as to justify us in adjudging that the requirement of a license was void as denying the equal protection of the laws. No such judgment could be properly rendered unless the classification was merely arbitrary or was devoid of those elements that are inherent in the distinction implied in classification. We cannot perceive that the requirement of a license is not based upon some reasonable ground—some difference that bears a proper relation to the classification made by the statute. *Gulf, Col. & Santa Fe Ry. v. Ellis*, 165 U. S. 150, 165."

In *Barbier v. Connolly*, 113 U. S. l. c. 32, it is again declared that:

> "Class legislation discriminating against some and favoring others is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

In *Missouri Railway Co. v. Mackey*, 127 U. S. l. c. 209, the court says:

> "And when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions. A law giving to mechanics a lien on buildings constructed or repaired by them, for the amount of their work, and a law requiring railroad corporations to erect and maintain fences along their roads, separating them from land of adjoining proprietors so as to keep cattle off their tracks, are instances of this kind. Such legislation is not obnoxious to the last clause of the Fourteenth Amendment, if all persons subject to it are treated alike under similar circumstances and conditions in respect both of the privileges conferred and the liabilities imposed."

In *Bell's Gap Railroad v. Pennsylvania*, 134 U. S. l. c. 232, the court says:

> "The provision in the Fourteenth Amendment that no state shall deny to any person within its jurisdiction the equal protection of the laws was

not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them."

Deeming it needless to further discuss the validity of the Missouri Anti-Trust Laws, and the correctness of the judgment in these cases, we respectfully ask that the writ of error be dismissed and that the judgments be affirmed.

All of which is respectfully submitted,

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APPENDIX.

CHAPTER 143, REVISED STATUTES OF MISSOURI, 1899, RELATING TO POOLS, TRUSTS AND CONSPIRACIES.

Article I.

Sec. 8965. Pools, trusts, etc., defined—penalty. Any corporation organized under the laws of this or any other state or country for transacting or conducting any kind of business in this State, or which does transact or conduct any kind of business in this State, or any partnership or individual or other association of persons whatsoever, who shall create, enter into, become a member of or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual or any other person or association of persons, to regulate or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm, or to maintain said price when so regulated or fixed, or shall enter into, become a member of or a party to any pool, agreement, contract, combination or confederation to fix or limit the amount or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm, shall be deemed and adjudged guilty of a conspiracy

to defraud, and be subject to penalties as provided *in this article; and provided,* that if such insurance companies or their agents or the board of fire underwriters doing business in any city of this State, shall combine in any city of this State, either directly or indirectly, or agree or attempt to agree, directly or indirectly, to fix or regulate the price or premium to be paid for insuring property located within or outside of such city against loss or damage by fire, lightning or storm, such company so violating the provisions of this article, either by itself, its agents, or by any such board of underwriters, shall be taken and deemed to have forfeited its right to do business in this State, and shall become liable to all the penalties and forfeitures provided for by the provisions of this article. (Laws 1891, p. 186, amended, Laws 1895, p. 237, amended, Laws 1897, p. 208, amended.)

Sec. 8966. Certain agreements declared unlawful.—That from and after the passage of this article, all arrangements, contracts, agreements or combinations between persons or corporations, or between persons or any association of persons and corporations designed or made with a view to lessen, or which tend to lessen full and free competition in the importation, manufacture or sale of any article, product or commodity in this State, and all arrangements, combinations, contracts or agreements, whereby, or under the terms of which, it is proposed, stipulated, provided, agreed or understood that any person, association of persons or corporations doing business in this State, shall deal in, sell or offer for sale in this State, any particular or specified article, product or commodity, and shall not during the continuance or existence of any such arrangement,

combination, contract or agreement, deal in, sell or offer for sale in this State, any competing article, product or commodity, are hereby declared to be against public policy, unlawful and void; and any person, association of persons or corporation becoming a party to any such arrangement, contract, agreement or combination, shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to the penalties provided for in this article. (Laws 1897, p. 208.)

Sec. 8967. Trust certificates, etc., declared unlawful.—It shall not be lawful for any corporation to issue or to own trust certificates, or for any corporation, agent, officer or employe, or the directors or stockholders of any corporation, to enter into any combination, contract or agreement with any person or persons, corporation or corporations, or with any stockholder or director thereof, the purpose and effect of which combination, contract or agreement shall be to place the management or control of such combination or combinations, or the manufactured product thereof, in the hands of any trustee or trustees, with the intent to limit or fix the price or lessen the production and sale of any article of commerce, use or consumption, or to prevent, restrict or diminish the manufacture or output of any such article. (Laws 1891, p. 186.)

Sec. 8968. Penalty.—Any corporation or company, individual, firm or association violating any of the provisions of this article, shall forfeit not less than five dollars nor more than one hundred dollars *for each day* it shall continue to do so, to be recovered by an action in the name of the State, at the relation of the Attorney-General, circuit or

prosecuting attorney—money thus recovered to go into the school fund of the county in which the cause accrues, and in the city of St. Louis into the school fund of said city. (Laws 1891, p. 186, amended, Laws 1895, p. 237.)

Sec. 8971. Forfeiture of charter by corporation.—Any corporation created or organized by or under the laws of this State, which shall violate any of the provisions of the preceding sections of this article, shall thereby forfeit its corporate rights and franchises; and its corporate existence shall, upon proper proof thereof being made in any court of competent jurisdiction in this State, be by the court declared forfeited, void and of non-effect, and shall thereupon cease and determine; and any corporation created or organized by or under the laws of any other state or country, which shall violate any of the preceding sections of this article, shall thereby forfeit its rights and privileges thereafter to do any business in this State, and upon proper proof being made thereof in any court of competent jurisdiction in this State, its right and privilege to do business in this State shall be declared forfeited; and in all proceedings to have such forfeiture declared, proof that any person who has been acting as the agent of such foreign corporation in transacting its business in this State has been, while acting as such agent, and in the name, behalf or interest of such foreign corporation violating any provision of the preceding sections of this article, shall be received as prima facie proof of the act of the corporation itself, and it shall be the duty of the clerk of said court to certify the decree thereof to the Secretary of State, and if it be an insurance company, also to the Superintend-

ent of the Insurance Department, who shall take notice and be governed thereby as to the corporate powers and rights of said corporation. (Laws 1891, p. 186, amended, Laws 1895, p. 237.)

Sec. 8972. Unlawful for corporation to transact business after forfeiting charter.—That whenever the corporate rights and franchises of any corporation organized under the laws of this State have declared forfeited by the judgment of a court of competent jurisdiction for any violation of the provisions of this article, and whenever the right and privilege of any corporation organized under the laws of any other state or country to do business in this State has been declared forfeited by the judgment of a court of competent jurisdiction for any violations of the provisions of this article, it shall thereafter be unlawful for any person, association of persons or corporation, to deal in, sell or offer for sale in this State, any article, product or commodity made, produced or manufactured, in whole or in part, by any corporation, whose rights, franchises or privileges have been so declared to be forfeited; and the foregoing provisions of this section are hereby made applicable in all respects to the successors or assigns of any corporation whose rights, franchises or privileges have been so forfeited. Any person violating the provisions of this section is hereby declared to be guilty of a felony, and upon conviction, shall be punished by imprisonment in the penitentiary for a term not exceeding three years, or by imprisonment in the county jail for a term not exceeding one year, or by a fine not less than one hundred dollars nor more than one thousand dollars, or by both such fine and jail imprisonment: Pro-

vided, that no statement made by any person in any affidavit made under the provisions of sections 8973 and 8974 of this article shall be competent as evidence against such person in any criminal prosecution brought under this section. (Laws 1897, p. 208.)

Sec. 8975. Article to be enforced, by whom.—It shall be the duty of the Attorney-General, the circuit attorney of the city of St. Louis and the prosecuting attorney of each county, respectively, to enforce the provisions of this article. The Attorney-General, the circuit or prosecuting attorneys shall institute and conduct all suits begun in the circuit courts, and upon appeal the Attorney-General shall prosecute said suits in the Supreme Court and courts of appeals. As compensation for his services in this behalf, the Attorney-General shall be entitled to his actual expenses incurred in the prosecution of such suits, to be paid by the defendant or defendants when judgment is rendered for the State. The circuit and prosecuting attorneys shall receive for their compensation one-fourth of the penalty collected. (Laws 1891, p. 186, amended, Laws 1895, p. 237.)

Article II.

Sec. 8978. Agreement to regulate prices, control or limit trade, declared illegal.—Every pool, trust, agreement, combination, confederation or understanding, conspiracy or combination entered into, or created, or organized by any corporation organized under the laws of this or any state, or any partnership or individual or other association of persons whatsoever with any other corporation, partnership, individual or any other person or association of per-

sons to regulate, control or fix the price of any article or articles of manufacture, mechanism, merchandise, commodity, convenience or repair, or any product of mining of any kind or class, or any article or thing of any class or kind bought and sold, or the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm, or to maintain said price or prices when so regulated, determined or fixed, and all agreements, combinations, confederations or conspiracies or pools made, created, entered into or organized by any corporation, partnership, individual, or association of individuals, to fix the amount or limit the quantity of any article or thing whatsoever, or of any article of manufacture, mechanism, commodity, convenience or repair, or any product of any class or kind of mining, are hereby declared illegal. If any two or more persons or corporations who are engaged in buying or selling any article of commerce, manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, shall enter into any pool, trust, agreement, combination, confederation, association or understanding to control or limit the trade in any such article or thing; or to limit competition in such trade, by refusing to buy from or to sell to any other person or corporation any such article or thing aforesaid, for the reason that such other person or corporation is not a member of or party to such pool, trust, combination, confederation, association or understanding; or shall boycott or threaten any person or corporation for buying from or selling to any other person or corporation who is not a member of or a party to such pool, trust, agreement,

combination, confederation, association or understanding any such article or thing aforesaid, it shall be a violation of this article. (New section.)

Sec. 8979. Jurisdiction of offenses—duty of Attorney-General and prosecuting attorneys.—The several circuit courts of this State are hereby vested with jurisdiction to prevent and restrain any corporation, partnership, individual or association of individuals from entering into any combinations, pools, agreements in the form of trusts, confederation, conspiracy or understanding declared illegal by this article or any other law of this State relative to pools, trusts and conspiracies and unlawful combinations. And it shall be the duty of the Attorney-General and of the prosecuting attorneys, when so directed by the Attorney-General, to institute proceedings in equity to prevent and restrain all violations of this act and of any other law concerning pools, trusts and conspiracies and unlawful combinations. Such proceedings may be by way of petition, setting forth the case and praying that such violation be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed as soon as may be to the hearing and determination of the case; and pending such petition and before final decree the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. (New section.)

Sec. 8982. Purpose of this article.—It is hereby expressly declared to be the intent of this article, not to repeal any former act or part thereof on the subject of pools, trusts, conspiracies and unlawful combinations, except the same be in direct and irrecon-

cilable conflict herewith. And it is hereby declared to be only the express purpose of this article to provide an additional remedy for the control and restraint of pools, trusts and conspiracies in restraint of trade and unlawful combinations. (New section.)

Article III.

Sec. 8983. Taking testimony in proceedings under this chapter.—Whenever any proceedings shall be commenced in any court of competent jurisdiction in this State by the Attorney-General against any corporation or corporations, individual or individuals or associations of individuals, or joint-stock associations or co-partnership, under the law against the formation and maintenance of pools, trusts of any kind, monopolies in commodities, combinations or organizations in restraint of trade to dissolve the same or to restrain their formation or maintenance in this State, then in such case, if the Attorney-General desires to take the testimony of any officer, director, agent or employe of any corporation or joint-stock association proceeded against, or in case of a copartnership, any member of said partnership, or any employe thereof, in any court in which said action may be pending, or before any person duly authorized by any court to take testimony in any such action, and the individual or individuals whose testimony is desired, are without the jurisdiction of the courts of this State, or reside without the State of Missouri, then, in such case, the Attorney-General shall file in said court in term time, or in vacation, or with any person duly authorized to take the testimony in such case, a statement, in writing, setting forth the name or names of

the persons or individuals whose testimony he desires to take and the time when, and the place in the State where he desires the said persons to appear; and, thereupon, the court in which, or one of the judges thereof, or the person before whom testimony is being taken, shall issue immediately a notice, in writing, directed to the attorney or attorneys of record in said cause, or any agent, officer, or employe of any corporation, joint-stock association or copartnership which are parties to said action, notifying said attorneys of record, or officer, agent or employe that the testimony of the person or persons named in the application of the Attorney-General is desired, and requiring said attorney or attorneys of record, or said officer, agent or employe, to whom said notice is delivered, or upon whom the same is served, to have said officer, agent, employe or representative of said copartnership or agent thereof whose evidence it is desired to take at the place named in the application of the Attorney-General and at the time fixed in said application, then and there to testify: Provided, however, that the said application shall always allow, in fixing said time, the same number of days for travel to reach the designated point in Missouri that would now be allowed by law in case of taking depositions: Provided, also, in addition to the above named time, six days shall be allowed for the attorney or attorneys of record, or the agent, officer or employe on whom notice is served to notify the person or persons whose testimony is to be taken. Service of said notice and the return thereon, in writing, may be made by any one authorized by law to serve a subpoena. (New section.)

Sec. 8984. Proceedings upon failure to testify or to produce books, papers, etc.—Whenever any attorney or attorneys of record, or any agent, officer or employe of any such corporation, joint-stock association or copartnership, shall be notified as above provided, to request any officer, agent, director or employe to attend before any court, or before any person authorized to take the testimony in said proceeding, and the person or persons whose testimony is requested, as above provided, shall fail to appear and testify and produce whatever books, papers and documents they may be ordered to produce by the court, or the officer authorized to take said evidence, then it shall be the duty of the court, upon motion of the Attorney-General, to strike out the answer, motion, reply, demurrer or other pleading then or thereafter filed in said action or proceeding, by said corporation, joint-stock association or copartnership, whose officer, agent, director or employe has neglected or failed to attend and to testify and produce all books, papers and documents he or they shall have been ordered to produce in said action by the court or person authorized to take said testimony; and said court shall proceed to render judgment by default against said corporation, joint-stock association or copartnership. (New section.)

Sec. 8985. Ibid.—And it is further provided, that in case any officer, agent, employe, director, or representative of any corporation, joint-stock association or copartnership in such proceeding as hereinbefore mentioned, who shall reside or be found within this State shall be subpoenaed to appear and testify or to produce papers, books and documents, and shall fail, neglect or refuse to do so,

then the answer, motion, demurrer, or other pleading then or thereafter filed by said corporation, joint stock association or copartnership in any such proceeding shall, on motion of the Attorney-General, be stricken out and judgment in said cause rendered against said corporation, joint-stock association or copartnership. (New section.)

V

Supreme Court U. S.
FILED
NOV 7 1911
JAMES H. McKENNEY,
Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 47.

STANDARD OIL COMPANY OF INDIANA,
PLAINTIFF IN ERROR,

vs.

THE STATE OF MISSOURI ON THE INFORMATION OF ELLIOTT W. MAJOR,
ATTORNEY-GENERAL, DEFENDANT IN ERROR.

No. 48.

REPUBLIC OIL COMPANY,
PLAINTIFF IN ERROR,

vs.

THE STATE OF MISSOURI ON THE INFORMATION OF ELLIOTT W. MAJOR,
ATTORNEY-GENERAL, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR.

ELLIOTT W. MAJOR,
Attorney-General;
CHARLES G. REVELLE,
Assistant Attorney-General;
Attorneys and Counselors for Defendant in Error.

(21,665 and 21,666.)

IN THE

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Statement.

This honorable court is without jurisdiction to review the judgment of the Supreme Court of Mis-

souri in these cases. The Attorney-General of Missouri, by his information in *quo warranto,* proceeded jointly against the Standard Oil Company of Indiana, the Republic Oil Company, and the Waters-Pierce Oil Company for having violated the anti-trust laws of that State by having entered into an agreement, arrangement, and combination among themselves to regulate, fix, and control the price of oils and to control and limit the trade and to limit and prevent competition.

The Supreme Court of Missouri found them guilty as charged and rendered one judgment against the said three companies. The *license* of the Standard Oil Company of Indiana and the Republic Oil Company to do business in Missouri (the Standard being an Indiana corporation and the Republic a New York corporation) was declared and adjudged forfeited, and the *charter* of the Waters-Pierce Oil Company (it being a Missouri corporation) was adjudged forfeited.

The court, in addition to forfeiting the *license* of the Standard Oil Company and the Republic Oil Company and the *charter* of the Waters-Pierce Oil Company, also imposed a fine on *each* of said three companies of $50,000.00.

Upon the Waters-Pierce Oil Company paying its fine of $50,000.00, the Supreme Court *suspended* the judgment of ouster in so far as said judgment applied to it, and retained jurisdiction over the case and said Waters-Pierce Oil Company, so

that it might, *at any time thereafter,* make said judgment of ouster *absolute.*

The Standard Oil Company of Indiana and the Republic Oil Company come to this court upon writ of error.

This honorable court does not take jurisdiction of the writs and cannot therefore consider the cases because the writs are defective, there being no severance.

This court will not take jurisdiction of the writs, because plaintiffs in error, who wished the benefit of same, did not summon the Waters-Pierce Oil Company before the court and secure an order or judgment of severance; neither did plaintiffs in error give written notice to, and secure a refusal to join in said writs of error from, said Waters-Pierce Oil Company.

For these failures upon the part of plaintiffs in error this court will not take jurisdiction and will not, therefore, consider the cases, and the said writs must be dismissed.

Judgment.

For the convenience of the court we here print the judgment rendered against the said three companies by the Supreme Court of Missouri (Printed Record, pp. 437-38-39).

"STATE OF MISSOURI *ex Information* HENRY S. HADLEY, *Attorney-General, Informant,*

vs.

"'STANDARD OIL COMPANY' OF INDIANA, 'REPUBLIC OIL COMPANY' OF NEW YORK *and* 'WATERS-PIERCE OIL COMPANY' OF MISSOURI, *Respondents.*

"And now, on this day, this court having fully considered the evidence in this cause, and announced and filed its opinion that the said respondents and each of them are guilty as charged in the information of the Attorney-General of a violation of the statute of this State, entitled, 'Pools, Trusts, and Conspiracies; Unlawful Combinations, Approved March 24th, 1877,' and an Act of the General Assembly of this State, approved April 2d, 1891, entitled, 'An act providing for the punishment of pools, trusts, and conspiracies to control prices and as to evidence and prosecution in such cases,' and now known as chapter 143 of the Revised Statutes of Missouri, 1899, come now the State of Missouri, by Herbert S. Hadley, the Attorney-General, and the said respondents by their respective counsel, and it is now here considered, ordered, and adjudged by the court, that the said respondents, and each of them, are guilty of violating the said acts of the General Assembly of this State, in that at the dates and times set forth in the information of the Attorney-General, they did form and enter into a pool, trust, combination, and conspiracy, to regulate, fix, and control the prices to be paid by retail dealers and others

in the State of Missouri, for naphtha, benzine, gasoline, kerosene, lubricating oil, and other products of petroleum, and to control and limit the trade in the articles aforesaid, and to prevent competition in said business of buying and selling naphtha, benzine, gasoline, kerosene, lubricating oil, and other products of petroleum, in this State, between themselves and others engaged in like business and to deceive and mislead the public, and did control, fix, and maintain the prices for said articles, and have prevented and destroyed competition in the purchase and sale of said products of petroleum in this State as charged in the information, and thereupon, it is considered, ordered and adjudged by the court that by reason of the violation of said statutes of this State, in forming and entering into and maintaining said unlawful combination, conspiracy, and pool, the said Standard Oil Company organized under the laws of the State of Indiana, and heretofore licensed to do business in this State, and the said Republic Oil Company, organized under the laws of the State of New York, and licensed to do business in this State, have each and both forfeited their respective licenses heretofore granted them by the Secretary of State of Missouri, and it is further considered, ordered, and adjudged, that said license of the said Standard Oil Company of Indiana, and the said license of the said Republic Oil Company of New York, be and the same are hereby forever forfeited, annulled, and cancelled, and the said Standard Oil Company of Indiana and the said Republic Oil Company of New York, are hereby ousted of

any and all rights and franchises granted to them under the laws of this State, to further do business in this State, and it is further considered and ordered and adjudged that the said 'Standard Oil Company' of Indiana and the said 'Republic Oil Company' of New York, each for the violation aforesaid of the laws of this State, in forming, entering into, and maintaining the conspiracy and combination to regulate, control, and fix the prices of said products of petroleum in this State, and to control and limit the trade in said products in this State and to prevent competition in said business, be fined fifty thousand dollars, and that each of said respondents, the said Standard Oil Company of Indiana, and the said Republic Oil Company of New York, pay each the said sum of fifty thousand dollars to the clerk of this court, on or before the first day of March, 1909, to be by said clerk paid into the treasury of the State, and upon default and failure so to do, that the State of Missouri have execution therefor, to be levied and enforced according to the laws of this State, in such cases made and provided, and it is further considered, ordered, and adjudged by the court, that the said respondent, the said 'Waters-Pierce Oil Company,' by its violation of the said laws and statutes of this State, against 'pools, trusts, and conspiracies,' and known as chapter 143 of the Revised Statutes of Missouri, 1899, has forfeited its charter to do business in this State, and it is therefore considered, ordered, and adjudged by the court, that the right and franchises heretofore granted to said Waters-Pierce Oil Company, to be a

body corporate and to do business and contract as such, with all other rights acquired by its certificate of incorporation, be, and the same are hereby forever forfeited, annulled and set aside and said Waters-Pierce Oil Company, is hereby ousted of its corporate rights and powers and franchises heretofore granted to and enjoyed by it under the laws of this State, subject, however, to the further provisions of this judgment, and for the violation of its said franchises, by forming, entering into and maintaining the said pool, combination, and conspiracy, to regulate, control, and fix the prices of the products of petroleum, as hereinbefore specifically found and set forth and to prevent competition in the business of buying and selling said products in this State, it is considered, ordered, and adjudged by the court that in addition to said ouster, said Waters-Pierce Oil Company be fined fifty thousand dollars, and that it pay said fine of fifty thousand dollars, to the clerk of this court, on or before the first day of March, 1909, to be by said clerk paid into the treasury of this State, and upon default and failure to pay said fine on or before said date, the State of Missouri have execution therefor, to be levied by the marshal of this court and enforced according to the laws of this State in such cases made and provided.

"But it is further considered, ordered, and adjudged by this court, that if the said Waters-Pierce Oil Company, shall pay said fine to the clerk of this court on or before the first day of March, 1909, and shall immediately cease all connection with the said

other respondents herein in continuing or maintaining said pool, trust, and conspiracy to fix, control, and regulate the prices of naphtha, benzine, gasolene, kerosene, lubricating oil, and all other products of petroleum, and shall refrain from all pools, trusts, and combinations to control the prices of said products of petroleum, and all combines and conspiracies to prevent competition in the trade of buying and selling said products and shall furnish this court with satisfactory evidence of its compliance with this judgment, and of its intention in good faith to cease all connection with its said co-respondents herein and all other parties or companies whatsoever, and in the future maintain and carry on its business as an independent corporation in obedience to the laws of this State and its charter then the judgment of ouster herein shall be and is hereby suspended and the writ of ouster herein will not issue until expressly directed by order of this court, and the said Waters-Pierce Oil Company is hereby given until the fifteenth day of January, 1909, to file the proofs of its willingness to comply with the judgment of this court, and until that date in no event, will the writ of ouster be awarded. And it is further considered, ordered, and adjudged by the court, that if it shall be shown to the satisfaction of this court hereafter, that notwithstanding the promises and assurances of the said Waters-Pierce Oil Company to abide by this judge, it has violated the conditions of this judgment and has violated the said statute against 'Pools, Trusts, and Conspiracies,' then and in such case the sus-

pension of the writ of ouster shall be removed by this court and absolute ouster be enforced as directed and adjudged herein.

"It is further ordered and adjudged that the State of Missouri at the relation of the Attorney-General have and recover its costs herein paid and expended, including the allowance of the special commissioner and the stenographer in taking and certifying the testimony herein and the fees of the witnesses and have execution therefor, against all of said respondents."

We next print that part of the record showing payment of the $50,000.00, etc., by the Waters-Pierce Oil Company (pp. 453, 4 & 5, Record).

Payment, Waters-Pierce Oil Co.

"IN THE SUPREME COURT OF MISSOURI.

"STATE, upon the Information of the Attorney-General, *Plaintiff*,

vs.

"THE STANDARD OIL COMPANY OF INDIANA, THE REPUBLIC OIL COMPANY, and THE WATERS-PIERCE OIL COMPANY, *Defendants.*

"Comes now the Waters-Pierce Oil Company in the above-entitled cause, pursuant to the order and judgment rendered therein, and files herewith a duly certified copy of a resolution of its board of directors, passed February 13th, 1909, wherein and whereby it agrees to accept, and does accept, the con-

ditions of the aforesaid decree, and agrees to abide by the same, and does hereby respectfully submit itself to the further orders, judgments and decrees of this honorable court in and concerning the premises.

"And the said The Waters-Pierce Oil Company deposits herewith a certified check in the sum of fifty thousand dollars ($50,000.00) to the order of the clerk of this court in payment of the fine imposed upon this defendant by virtue of said judgment and decree.

"WATERS-PIERCE OIL COMPANY.
By BOYLE & PRIEST,
J. D. JOHNSON, *Its Attorneys.*

"STATE OF MISSOURI,
City of St. Louis, ss:

"The undersigned, C. A. Pierce, president of the Waters-Pierce Oil Company, a corporation organized under the State of Missouri, hereby certifies that the following is a true and correct copy of the minutes of the adjourned regular monthly meeting of the board of directors of said company, held at the company's office in the city of St. Louis on the 13th day of February, 1909, as the same appears of record in the regular minute book in which is entered the minutes of the meetings of the board of directors of said company, to wit:

"OFFICE OF WATERS-PIERCE OIL COMPANY,
"420 OLIVE STREET, ST. LOUIS, MO.,
"*February 13th*, 1909.

"At the adjourned regular meeting of the board of directors of the Waters-Pierce Oil

Company, held at the company's office in the city of St. Louis, Missouri, this the 13th day of February, 1909, there were present and participated in the meeting H. C. Pierce, chairman of the board; C. A. Pierce, president; C. M. Adams, secretary and treasurer, and Walter F. Taylor, directors.

"The meeting was called to order by H. C. Pierce, chairman of the board, and Mr. Adams acted as secretary. The minutes of the special meeting of the board, held on the 14th day of January, 1909, and of the regular monthly meeting of the board, held on the 1st day of February, 1909, were read and approved.

"The following resolution was then offered, and, on motion duly seconded, was unanimously adopted, to wit:

" 'Resolved, That this company, protesting that it has never consciously or knowingly violated any of the provisions of the laws of this State, nevertheless does hereby accept the terms and conditions of the order or decree of the Supreme Court of Missouri, entered in the cause of the State upon the information of Herbert S. Hadley, Attorney-General, against the Standard Oil Company of Indiana, the Republic Oil Company and the Waters-Pierce Oil Company, and does hereby express its willingness to abide by the same.'

"There being no further business to transact the meeting adjourned.

"H. C. PIERCE,
"Chairman of the Board.

"Attest:
"C. M. ADAMS, *Secretary.*

"In witness whereof the said C. A. Pierce, president of said company, has hereunto set his hand, and C. M. Adams, secretary of said company, has attested these presents and affixed the corporate seal of said corporation thereto. All done at the city of St. Louis, State of Missouri, this the 13th day of February, 1909.

"CLAY ARTHUR PIERCE, *President.*

"Attest:
[SEAL.] C. M. ADAMS, *Secretary.*"

We now print the order of court *sustaining* the judgment of ouster of the Waters-Pierce Oil Company, but which judgment of ouster may be made absolute at any time (p. 478, Record).

Order Suspending Ouster.

"STATE *ex Inf.* ATTORNEY-GENERAL
vs.
STANDARD OIL COMPANY ET AL.

"The Waters-Pierce Oil Company having tendered into court the amount of the fine imposed on it by the judgment of this court, having given satisfactory evidence of its purpose to henceforth so conduct its business as not to violate the law of this State in regard to pools, trust, and conspiracies, it is ordered by the court that the clerk of this court receive the money so tendered and pay the same into the State treasury, and it is further ordered that the judgment of this court of date December 23d, 1908, ousting the Waters-Pierce Oil

> Company of its charter, and adjudging all its rights and privileges thereunder forfeited and annulled, be and the same is hereby suspended until otherwise ordered by the court, but the court will retain jurisdiction of the cause for the purpose of setting aside and annulling this order or modifying the same if the court should hereafter on motion of the Attorney-General or its own motion become satisfied that the Waters-Pierce Oil Company is at that time or has been conducting its business in a manner forbidden by the law of this State in relation to pools, trust, and conspiracies."

By reason of these facts and by reason of the failure to secure a severance or the refusal of the Waters-Pierce Oil Company to join in the writs upon written notices, etc., all of which must be a matter of record, this court cannot take jurisdiction and consider the cases and the writs must be dismissed.

Points and Authorities.

I.

All parties against whom a judgment or decree is entered must join in suing out a writ of error, unless summons has been issued and the court has ordered a severance, or unless the parties upon due and proper written notice file their refusal to join.

This must be done even where a party *defaulted* below.

Masterson *vs.* Herndon, 10 Wall., 416.
Beardsly *vs.* R. R. Co., 158 U. S., 123.
Todd *vs.* Daniel, 16 Pet., 521.
Simpson *vs.* Breeley, 20 Wall., 152.
Inglehart *vs.* Stansbury, 151 U. S., 568.
Hardee *vs.* Wilson, 146 U. S., 179.
Feibelman *vs.* Packard, 108 U. S., 14.
Wilson *vs.* Keisel, 164 U. S., 248.
Foster's Federal Practice, Vol. 3, p. 2052.

II.

Written notice to a defendant and his refusal to join in the writ of error is equivalent to a summons and a severance.

O'Dowd *vs.* Russell, 14 Wall., 402.

III.

Unless there has been a severance or notice to and a refusal to join, the Supreme Court of the United States does not take jurisdiction of the writ of error. The same rule applies to both an appeal and a writ of error.

Estes *vs.* Trabue, 128 U. S., 225.
Mason *vs.* United States, 136 U. S., 581.
Feibelman *vs.* Packard, 108 U. S., 14.

IV.

Where an appeal or writ of error is brought by one of several joint defendants, without a summons and severance or proceedings equivalent thereto, such as notice and refusal to join, the appeal will be dismissed.

Hardee *vs.* Wilson, 146 U. S., 179.
Simpson *vs.* Greeley, 20 Wall., 152.
Shannon *vs.* Cavazos, 131 U. S., —.
Inglehart *vs.* Stansburg, 151 U. S., 68.

V.

That the judgment or decree may make different provisions with respect to the defendants is immaterial; the writ cannot be prosecuted without the severance or notice and refusal.

Beardsley *vs.* Arkansas R. R., 158 U. S., 123.

VI.

The reason for the rule is that the plaintiff may know the condition of his judgment and that the courts may not be called upon two or more times to pass upon the same questions and in the same case.

VII.

After plaintiffs in error sued out their writs the Waters-Pierce Oil Company could also sue out a writ, and thus the court would be called upon to pass upon all the questions over again.

Again, the State was entitled to know *at the time* the plaintiffs in error sued out their writs what the Waters-Pierce Oil Company would do, so the State might know the condition and character of its judgment.

VIII.

The Waters-Pierce Oil Company could be in no better position than a defendant which had defaulted. If a severance must be had for a defendant who has defaulted certainly a severance must be had as to the Waters-Pierce Oil Company, before the Standard Oil Company of Indiana and the Republic Oil Company could prosecute their writs in this honorable court.

Foster's Federal Practice, vol. 3, p. 2052.
Masterson *vs.* Herndon, 10 Wall., 416.
Beardsly *vs.* Railroad Co., 158 U. S., 123.

ARGUMENT.

The Standard Oil Company of Indiana, the Republic Oil Company, and the Waters-Pierce Oil Company, having been proceeded against jointly by the State of Missouri for having entered into an agreement, arrangement, and conspiracy among themselves to fix, regulate, and control the prices of oils in Missouri, and to control and limit trade, and to prevent competition, all in violation of the laws of that State, and the court having found and adjudged them guilty as charged, and the court having entered one judgment against the three said corporations, no one of the defendants could sue out a writ of error without having the court order a severance or without having given written notice and without having filed the refusal of the others to join in the writ.

Had one of the defendant companies defaulted, this court could not have taken jurisdiction of the writ of error without a severance or notice and refusal of the others to join in the writ appearing of record. Had the Waters-Pierce Oil Company defaulted, these writs could not be heard. One who defaults is willing to take and accept the judgment of the court. The Waters-Pierce Oil Company could occupy no better position than if it had defaulted.

The Waters-Pierce Oil Company was not precluded at any time within the statutory period

from suing out a writ. The court might at any time after entering an order suspending the judgment of ouster as to it, and after having received the payment of $50,000, make the ouster absolute, and the company could still prosecute a writ of error.

When the plaintiffs in error in these cases sued out their writs the State of Missouri was entitled to know at that time what would be done by the Waters-Pierce Oil Company, so as to know what character of judgment it had against the defendants. Before the plaintiffs in error could be heard upon writ of error in this court it became their duty to compel the Waters-Pierce Oil Company to determine by its statements in the case what its attitude would be. It became necessary to close the forum as to all three defendants. In other words, each of the three defendants had to determine at that time what the attitude of each would be toward joining or not joining in the writ and the whole matter entered of record, otherwise the Supreme Court of the United States would not take jurisdiction and the action of the Supreme Court of Missouri could not be reviewed.

That the court ordered the suspension of the judgment of ouster as to the Waters-Pierce Oil Company is immaterial, and, besides this, it could be made absolute at any day by the court. Upon motion to make the judgment absolute, should the same have been sustained, there not having been a severance and the company not having been com-

pelled to join in the writs or file its refusal, the Waters-Pierce Company could sue out its writ of error and thus defeat what should have been a final judgment from which no writ of error could have been sued out, had the Standard Oil Company of Indiana and the Republic Oil Company proceeded in the matter of suing out their writs as the law and rule required them to do.

The plaintiffs in error not having had the court order a severance and not having given notice and not having secured the refusal of the Waters-Pierce Oil Company to join in the writs, this court will not take jurisdiction. For these reasons we ask that the writs be dismissed, and for all other proper relief, entries, and decrees.

Respectfully submitted,

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